1749.

FRANCHISE TAX—COMPUTATION OF ASSETS LOCATED WITHIN THIS STATE INCLUDES VALUE OF BUSSES OF DOMESTIC BUS COMPANY USED IN INTERSTATE TRAVEL WHERE PART OF INTERSTATE JOURNEYS ARE IN THIS STATE—"BUSINESS DONE WITHIN THE STATE" INCLUDES INTERSTATE BUSINESS WHERE PART OF JOURNEYS ARE WITHIN THIS STATE.

SYLLABUS:

1. *In computing the franchise tax on a domestic bus corporation for the privilege of exercising its corporate franchise as a domestic corporation, the value of the busses of a domestic bus company used solely in interstate travel, where a part of such interstate journeys are in the state of Ohio, should be included in the computation of its total assets located within the state of Ohio.*

2. *Likewise in computing such tax "business done within the state" includes the interstate business where a part of such journeys are within the state of Ohio.*

COLUMBUS, OHIO, October 20, 1933.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your communication which reads as follows:

"The Eastern Greyhound Lines, Inc. of Ohio is incorporated under the laws of the State of Ohio. Its principal place of business as designated in its articles of incorporation is Cleveland, and also as set forth in its articles it is authorized to do the following:

'Owning, operating, renting and hiring motor busses, motor cars and motor trucks for the purpose of transporting passengers, baggage, express matter, baggage, U. S. mail and freight, constructing, building, acquiring by purchase, lease or otherwise, owning, maintaining, operating and selling terminals, garages and stations and acquiring by purchase, lease or otherwise, holding, improving and selling real estate and personal property necessary and convenient to carry out the purpose herein mentioned and the doing of all things necessary and incident thereto.'

In the 1933 franchise tax report submitted by this company, it was stated that the nature of the business in which it is engaged is passenger bus transportation. In this report, it set up a certain sum as representing the total amount of its assets located in the state of Ohio and a certain sum as representing the amount of its assets located without the state of Ohio. It likewise reported a certain amount as representing business transacted within the state and a certain amount as representing extra-state business.

Upon inquiry by the commission as to what items of assets had been reported in the amount set up as the total of its assets located in the state of Ohio, the company stated it had included in that amount all physical assets located within the state, the value of the busses in this state in intra-state transactions and that it had allocated to Ohio certain intangible assets, such as deferred charges and organization and development expense, and that it had reported as assets outside of Ohio

the busses used in interstate transportation and purely extra-state transportation, together with all physical property located without the state and certain intangible assets.

Upon inquiry also as to what had been reported as business transacted within the state, the company stated that it had reported as such business only that arising from purely intra-state transportation, or in other words, that arising from transportation from one point in Ohio to another point in the state, and it further stated that all inter-state transportation and all purely extra-state transportation had been considered as business transacted outside of Ohio.

The company has three groups of operations for its busses and has stated that it maintains a certain number of busses on each class of operation. The groups are as follows:

First: Busses starting from Cleveland and operating wholly within the state of Ohio, such as from Cleveland to Ashtabula and from Cleveland to Painesville.

Second: Busses operating in interstate transportation consisting of two routes—one from Cleveland to Buffalo and northeastern points and the other from Cleveland to New York via Erie and Scranton, Pa.

Third: Busses operating entirely outside the state of Ohio with the starting point outside of Ohio and no termination in Ohio.

With the foregoing before you, the commission desires first— your opinion on the situs of the busses of this company for franchise tax purposes—that is as to what part of their value is properly allocated to Ohio, the company in its report having placed as assets in Ohio only the value of the busses used in intra-state operations.

And second, your opinion as to what should be included as business in Ohio, the company having reported only that arising from operations wholly within the state of Ohio."

Section 5495, General Code, provides in part:

"The tax provided by this act for domestic corporations shall be the fee charged against each corporation organized for profit under the laws of this state, except as provided herein, for the privilege of exercising its franchise during the calendar year in which such fee is payable * * *."

Section 5497, General Code, provides in part:

"The annual corporation report shall include statements of the following facts as of the date of the beginning of the current annual accounting period of such corporation:

* * * * * * * * *

8. The location and value of the *property owned or used* by the corporation as shown on its books, *both within and without the state,* given separately; and the total amount of business done and *the amount of business done within the state* by said corporation during its preceding annual accounting period, given separately. *Business done within this state by domestic corporations shall include all business except extra-state business;*

* * * * * * * * *"

(Italics the writers.)

Section 5498, General Code, prior to its 1933 amendment, provided inter alia:

"* * * The commission shall then determine as follows the base upon which the fee provided for in Section 5499 of the General Code, shall be computed. Divide into two equal parts the value as above determined of the issued and outstanding shares of stock of each corporation filing such report. Take one part and multiply by a fraction whose numerator *is the fair value of all the corporation's property owned or used by it in Ohio* and whose denominator is the fair value of all its property wheresoever situated; take the other part and multiply by a fraction whose numerator is the *value of the business done by the corporation in this state* during the year preceding the date of the commencement of its current annual accounting period and whose denominator is the total value of its business during said year wherever transacted.

In determining the amount or value of intangible property, including capital investments, owned or used in this state by either a domestic or foreign corporation the commission shall be guided by the provisions of Section 5328-1 and 5328-2 of the General Code except that investments shall be allocated in and out of the state in accordance with the value of physical property in and out of the state representing such investments.

On the first Monday in June the tax commission shall certify to the auditor of state the amount determined by it through adding the two figures thus obtained for each corporation." (Italics the writer's.)

Section 5499, General Code, provides in part:

"On or before June 15th the auditor of state shall charge for collection from each such corporation a fee of one-tenth of one per cent upon such value so certified, and shall immediately certify the same to the treasurer of state, provided, however, that no fee shall be charged from any corporation which shall have been adjudicated a bankrupt, or for which a receiver shall have been appointed or which shall have made a general assignment for the benefit of creditors, except for the portion of the then current year during which the tax commission shall find such corporation had the power to exercise its corporate franchise unimpaired by such proceedings or act. But in no case shall the fee be less than twenty-five dollars. * * *"

Sub-section 8 of Section 5497, General Code, supra, defines "business done within the state" by domestic corporations to include all business except "extra-state business." "Extra-state business" with reference to this domestic bus company in question would include only busses operating entirely outside the state of Ohio. However, "business done within the state" would include the business of busses of such domestic corporation operating in interstate transportation where the starting points or termination points of such interstate journeys are within the state of Ohio, as the definition of "business done within the state" includes all business except extra-state business defined supra. This seems to be the most reasonable construction of the language used and is evidently the legislative intent.

Sub-section 8 of Section 5497 uses the words "property owned or used by the corporation, both within and without the state, given separately". Section 5498, General Code, supra, provides inter alia:

"* * * Take one part and multiply by a fraction whose numerator is the fair value of all the corporation's property *owned or used by it in Ohio* and whose denominator is the fair value of all its property wheresoever situated * * *." (Italics the writer's.)

The busses of such domestic corporation which travel on interstate journeys from points within Ohio to points without Ohio, or from points without Ohio to points within Ohio are obviously "owned or used" by such company in Ohio and it was evidently the intention of the legislature that their value should be computed in ascertaining the value of the domestic corporation's property owned or used by such corporation within the state of Ohio.

By Section 5495, General Code, supra, the franchise tax here in question is the fee charged domestic corporations for the privilege of exercising the franchise during the calendar year in which such fee is payable. In my opinion the word "privilege" is here used in the sense of the permission obtained from the state to exercise its franchise *as a domestic corporation,* a permission which might have been entirely withheld. Through control over the corporate entity and reserved power to amend and repeal the corporate charter this initial power of the state to grant the franchise "to be" a corporation is a continuing power over the corporate entity exercisable by the state of incorporation.

The inclusion of interstate commerce receipts where part of such interstate journeys is in Ohio, as one of the factors for computing or measuring the excise tax imposed by the state for the privilege of exercising its franchise as a domestic corporation presents a constitutional problem. Article 1, Sections 8-10, of the Federal Constitution forbids the state to impose any burden upon interstate commerce. This necessitates a short review of the "gross receipts" cases.

The question of a direct tax on the gross receipts of corporations engaged in both intrastate and interstate commerce came up as early as 1870 in the case of *Commonwealth of Pennsylvania* vs. *Buffalo & Erie Railway Co.,* 2 Pearson 376. In that case the Pennsylvania court held that a tax upon total gross receipts from both interstate and intrastate commerce was valid and was not a burden on interstate commerce. This view was confirmed two years later by the United States Supreme Court in State Tax on Railway Gross Receipts, 15 Wall. 284. However, this doctrine was overruled in 1887 in the two famous cases of *Fargo* vs. *Michigan,* 121 U. S. 230, and *Philadelphia and Southern Steam Ship Co.* vs. *Pennsylvania,* 122 U. S. 326, in which cases the court held that a state tax directly on gross receipts derived from interstate commerce was unconstitutional as a burden on interstate commerce.

The Supreme Court in 1891 handed down a decision in *State of Maine* vs. *The Grand Trunk Railway Co.,* 142 U. S. 217, which is the land mark case for present day law on the taxation of gross receipts. The state of Maine had imposed a tax upon the gross receipts of railways for the privilege of doing business within the state. The gross receipts from both interstate and intrastate commerce were used, the tax being levied on that proportion of the total gross receipts which the track mileage within the state bore to the total track mileage operated by the company. The Supreme Court held that the tax was valid, reasoning that the tax was only measured by gross receipts from interstate and intrastate commerce and therefore was not a direct burden on interstate commerce.

At the outset it must be admitted that the ensuing decisions of the United States Supreme Court upon the taxation of gross receipts derived from interstate commerce are confusing. The Supreme Court has held that a tax imposed upon

the business of selling goods through foreign and interstate commerce measured by total gross receipts is a burden upon interstate and foreign commerce. *Crew Levick Co.* vs. *Penn.* 245 U. S. 292. It has also held that an occupational tax upon railways lying wholly within the state based upon gross receipts from both interstate and intrastate commerce is invalid, the property and the franchise of the railways having already been taxed. *Galveston, H. & S. A. Railway Co.* vs. *Texas,* 210 U. S. 217. A gross revenue tax, in addition to the conventional property taxes, laid upon public service corporations engaged in interstate and intrastate commerce, measured by such proportion of the total gross receipts, including receipts from lands and bonds held outside the state, as the business within the state bears to the total business of the corporation, has been held unconstitutional as a burden on interstate commerce and as a tax on property outside the state. *Meyer* vs. *Wells, Fargo & Co.,* 223 U. S. 298.

On the other hand, since the time of the leading case of *Maine* vs. *Grand Trunk Railway Co., supra,* the Supreme Court has held that a tax on property and business of a corporation computed upon a certain percentage of the gross income of the corporation from interstate and intrastate commerce within the state is constitutional. *Wis. & Mich. Ry. Co.* vs. *Powers,* 191 U. S. 379. A property tax in lieu of all other property taxes, ascertained by reference to gross receipts both in interstate and intrastate commerce, is also valid. *U. S. Express Co.* vs. *Minnesota,* 223 U. S. 335; *Cudahy Packing Co.* vs. *Minnesota,* 246 U. S. 450. In this way a state may tax property on its value as a part of a going concern if the method does not discriminate against interstate commerce. *Pullman Co.* vs. *Richardson,* 261 U. S. 330. A license tax imposed upon the business of manufacturing within the state may be measured by the gross receipts from sales both in interstate and intrastate commerce. *American Mfg. Co.* vs. *St. Louis,* 250 U. S. 459. In computing a general income tax upon a domestic corporation, a state may include net income derived from transactions in interstate commerce. It has also been held by the United States Supreme Court that a license tax may be imposed upon a domestic insurance company measured by the total gross receipts from within and without the state. *N. W. Mutual Life Ins. Co.* vs. *Wisconsin,* 247 U. S. 132.

The general proposition that a state tax which regulates or burdens interstate commerce is unconstitutional can readily be admitted. *Philadelphia and Southern Steam Ship Co.* vs. *Pennsylvania, supra; McCallen Co.* vs. *Massachusetts,* 279 U. S. 620. But if the tax only incidentally burdens interstate commerce it is not thereby unconstitutional. *Railroad Co.* vs. *Penniston,* 18 Wall. 5; *Postal Telegraph Co.* vs. *Adams,* 155 U. S. 688; *Union Tank Line Co.* vs. *Wright,* 249 U. S. 275. Such "rules" admit of no clear-cut separation, the function of the court being to draw a practical line, making distinctions of degree rather than of kind. See *Galveston, H. & S. A. Ry. Co.* vs. *Texas, supra.* When the tax is computed on gross receipts of a company engaged in interstate commerce, the court must decide whether the receipts are being used as a means of evaluating the subject of the tax. See *Cudahy Packing Co.* vs. *Minnesota, supra.* The announced policy of the court is to determine the constitutionality of these taxes "upon our own judgment of the actual operation and effect of the tax, irrespective of the form it bears and how it is characterized by the state courts". See *Crew Levick Co.* vs. *Pennsylvania,* 245 U. S. 292 at page 294.

It would seem on reviewing the foregoing cases, that we may deduce the following rules: A state may use gross receipts from interstate commerce as a basis for computing or measuring the franchise tax which the state has the power to impose. But a state may not tax gross receipts derived from interstate

commerce as such or impose any tax which is intended to tax gross receipts as such, since such taxes are unconstitutional as a burden on interstate commerce. Nor may a state use gross receipts as a basis for any other tax which that state might not lawfully impose, such as a tax on property outside the state or a tax on the right to do an interstate business. It is impossible to lay down any rigid and inflexible rule for all cases which will distinguish a tax on gross receipts from a tax measured by gross receipts. Neither the name of the tax nor the wording of the statute is conclusive. *Galveston H. & S. A. Ry. Co.* vs. *Texas, supra.* It is a question which must depend upon the circumstances of each case.

There are three forms in which gross receipts may be used as a measure for any given tax. First, the total gross receipts from interstate and intrastate commerce accruing both within and outside the state may be used. *American Mfg. Co.* vs. *St. Louis, supra; N. W. Mutual Life Ins. Co.* vs. *Wisconsin, supra; Ins. Co. of N. A.* vs. *Commonwealth,* 87 Pa. 137; *State* vs. *Standard Oil Co.,* 61 Ore. 438. Second, some proportion of such total gross receipts may be used. *State of Maine* vs. *Grand Trunk Railway Co., supra.* Third, total gross receipts earned within the state may be used. *U. S. Express Co.* vs. *Minnesota, supra.* The fact that a state uses gross receipts excluding purely extra-state business but including receipts from interstate commerce where part of such interstate journeys are within the state as a measure for computing the franchise tax for the privilege of exercising its corporate franchise as a domestic corporation, does not mean in and of itself that the state is attempting to reach the gross receipts from interstate commerce. If such were the intent the court would look through the form and call it a direct tax on the gross receipts and consequently unconstitutional.

The only case I am able to find casting any doubt on the proposition that a state can measure the value of the domestic corporation's franchise to exercise its corporate privileges as a domestic corporation by reference to gross receipts from interstate commerce is *New Jersey Bell Telephone Co.* vs. *State Board of Taxes and Assessments,* 280 U. S. 338, decided in 1930. The state of New Jersey, in addition to property taxes, provided for a so-called "Franchise Tax" to be collected from all taxpayers using or occupying public streets, highways, roads or other places for telephone lines. The tax was to be on such proportion of gross receipts as the length of the lines in the streets bore to the length of the whole line. As the lines were used for both interstate and intrastate messages, the defendant telephone company, a domestic corporation, objected to paying that part of the tax based on receipts from interstate commerce. It was held on appeal (two justices dissenting) that the exaction was a direct tax on gross receipts derived from the company's interstate commerce, and is to that part, at least, void.

The amount of the assessment in the above case was equivalent to a property tax upon the easement at a valuation in excess of thirty-two hundred dollars ($3,200) per mile, or twenty-seven million dollars ($27,000,000) in all, for the privilege of using and occupying public property; hence it seems clear that the tax could not be justified as a tax on property measured by reference to gross earnings, under the rule of the "Cudahy" case supra. The case was argued by the Attorney General of New Jersey on the theory that the tax was a property tax levied on intangible property, but the court observed that under the state constitution property was required to be assessed by uniform rules according to its true value, and that the legislature could not reasonably be deemed to have intended direct valuation and assessment of some of the property at local rates, and the measurement of the value of other elements of the plant by a percentage of gross earnings. The court decided it was not a property tax and held the

tax to be a direct tax on gross receipts and consequently void as an interference with interstate commerce. An analysis of the opinion of the court discloses that the "exaction" in that case was neither a property tax nor a franchise tax but a direct tax on gross receipts. The court at page 349 of the opinion speaking through Mr. Justice Butler said:

> "The exaction is a direct tax on gross receipts derived from appellant's interstate commerce, and as to that part at least is void."

There is some obiter dicta, however, which is extremely confusing. The court at page 346 of the opinion states:

> "This tax cannot be sustained if it is not upon the property but is in fact a tax upon appellant's gross receipts from interstate and foreign commerce or a license fee to be computed thereon."

However, it is my opinion that the court did not consider the case as presenting squarely the issue whether a franchise tax for the privilege of exercising its corporate franchise as a domestic corporation could be measured by gross receipts including those from interstate commerce. Such state taxation by reference to gross receipts has not been settled by any prior decisions even if it can be said to have been assumed to the contrary in this case. In *Meyer* vs. *Wells, Fargo & Co.,* 223 U. S. 298, and *Galveston Railway Co.* vs. *Texas,* 210 U. S. 217, the problem of whether such franchise could be taxed by a reference to gross receipts was not before the Court because in the "Meyer" case a foreign corporation was the complainant, and in both cases the intangible property of the corporations had been taxed under other statutes. It is also to be noted that the "Crew Levick" case left open the problem of franchise taxes when the court said that the tax in question, "bears no semblance of a property tax, or a franchise tax in the proper sense". 245 U. S. 292 at page 297. There is no direct authority to sustain the assumption that a true franchise tax on the privilege of exercising the corporate franchise as a domestic corporation, cannot be measured by gross receipts in a situation where the going concern value of the plant is not reached in any other way. Without measurement by gross receipts the possibilities of evasion and practical difficulties connected with the tax on net earnings are apparent.

As to the inclusion of the value of the busses used in interstate commerce within the property fraction of "total assets located within the state of Ohio", in the computation of the excise tax on such domestic corporation for the privilege of exercising its corporate franchise as a domestic corporation, it is my opinion that there is very little constitutional doubt as to the power of the state legislature to include such. The franchise tax imposed on a domestic corporation is not rendered invalid under the commerce clause merely because part of the property or capital included in computing the tax is used by it in interstate commerce. *International Shoe Co.* vs. *Shartel,* 279 U. S. 249. *Great Northern Railway Co.* vs. *Minnesota,* 278 U. S. 503; *Western Cartridge Co.* vs. *Emmerson,* 281 U. S. 511; *Eastern Air Transport Co. Inc.,* vs. *Tax Commission,* 285 U. S. 147.

Specifically answering your inquiries, it is my opinion that:

1. In computing the franchise tax on a domestic bus corporation for the privilege of exercising its corporate franchise as a domestic corporation, the value of the busses of a domestic bus company used solely in interstate travel, where

a part of such interstate journeys are in the state of Ohio, should be included in the computation of its total assets located within the state of Ohio.

2. Likewise in computing such tax "business done within the state" includes the interstate business where a part of such journeys are within the state of Ohio.

Respectfully,
JOHN W. BRICKER,
Attorney General.

1750.

SHERIFF—DUTY OF PROSECUTING ATTORNEY TO DEFEND ACTIONS AGAINST SHERIFF AND DEPUTY SHERIFF FOR FALSE ARREST WHILE PERFORMING OFFICIAL DUTIES.

SYLLABUS:

It is the duty of a prosecuting attorney to defend a county sheriff and deputy sheriff in actions brought against them for damages for false arrest if the facts and circumstances on which the actions are based show that the suits arise out of a well intended attempt on the part of such sheriff and deputy sheriff to perform duties attending their official positions.

COLUMBUS, OHIO, October 21, 1933.

HON. LOUIS J. SCHNEIDER, *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—I am in receipt of your recent communication which reads as follows:

> "The Sheriff of this County has required those deputies who are assigned to police duty in the County to furnish a bond, conditioned upon their faithful performance of their duties. In two or three cases suits have been brought against such a deputy, and in one case, at least, against such deputy and the Sheriff, for damages for false arrest. The Sheriff has asked me to represent him and his deputies in these matters. I desire to do whatever is proper and feel that I should like to have your opinion, first—as to whether it is or it is not my duty to defend in these cases, and secondly—if it is not my duty, whether it would be improper under the law to do so."

Section 2917, General Code, provides as follows:

> "The prosecuting attorney shall be the legal adviser of the county commissioners and all other county officers and county boards and any of them may require of him written opinions or instructions in matters connected with their official duties. *He shall prosecute and defend all suits and actions which any such officer or board may direct or to which it is a party,* and no county officer may employ other counsel or attorney at the expense of the county except as provided in section twenty-four hundred and twelve. He shall be the legal adviser for all township officers, and no such officer may employ other counsel or attorney except on the order of the township trustees duly entered upon their journal,