

OHIO CANAL.		Valuation.
Eureka Store Co., Land Lease.....	-----	\$900 00
Stanton H. Fox, Land Lease.....	-----	750 00
C. C. Truax, Land Lease.....	-----	2,500 00
INDIAN LAKE.		Valuation.
Bellefontaine Outing Club, Cottage Site.....	-----	\$1,666 67
James F. Demaris, Cottage Site.....	-----	400 00
W. Demaris, Cottage Site.....	-----	400 00
Sarah R. Marshall, Business, Cottage Site and Landing...	-----	8,333 34

I have carefully examined said leases, find them correct in form and legal, and am therefore returning the same with my approval endorsed thereon.

Respectfully,
C. C. CRABBE,
Attorney-General.

3916.

TAXES AND TAXATION—QUESTIONS RELATING TO PAYMENT OF
FRANCHISE TAX WHEN AN ELECTION HAS BEEN MADE UNDER
SECTION 192 G. C. ANSWERED.

SYLLABUS:

1. *The payment of its franchise tax by an Ohio corporation for 1926 will not exempt the stock of a foreign corporation (which took over the assets of the Ohio corporation April 1, 1926) from taxation in Ohio for the current year.*

2. *When an election has been made by a foreign corporation under the provisions of section 192 G. C. and filed with the Tax Commission, said election may not be withdrawn.*

COLUMBUS, OHIO, December 30, 1926.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your recent communication which reads:

"The National Cash Register Company of Ohio made its report as a domestic corporation for profit in April, 1926, and was thereupon assessed with a franchise tax. The assets of this corporation were transferred to The National Cash Register Company of Maryland on April 1, 1926.

On March 29, 1926 the Maryland corporation, under the provisions of section 192 of the General Code, elected to pay annually a franchise tax at the times, in the manner, on the basis and in the amount prescribed by law for domestic corporations. This election was made in order that the stock of the Maryland corporation held by residents of Ohio might be exempted from taxation. As a result of the election a charge was also assessed against the Maryland corporation for the year 1926.

These companies now contend that the payment of the franchise tax assessed against the Ohio corporation for the year 1926 will exempt the stock of the Maryland corporation from local taxation. The Commission, there-

fore, respectfully requests your opinion as to whether the payment of the tax assessed against the Ohio corporation will exempt the stock of the Maryland corporation from taxation in this state for the current year and also whether if an election has been made by a foreign corporation, whether such election may be withdrawn either before or after the basis of the tax has been certified to the Auditor of State.

We are enclosing herewith a copy of the application for review and correction, and also a copy of a brief in which the corporation sets forth its views in this matter."

The pertinent facts are as follows:

"The National Cash Register Company of Ohio made its report as a domestic corporation for profit in April, 1926 and was therefore assessed with a franchise tax.

The assets of said corporation were transferred to The National Cash Register Company of Maryland, April 1, 1926.

The Maryland corporation on March 29, 1926, under the provisions of section 192, General Code, elected to pay annually a franchise tax at the times, in the manner, on the basis and in the amount prescribed by law for domestic corporations.

This election was made in order to exempt the stock of the Maryland corporation held by residents of Ohio.

As a result of said election, a charge was assessed against the Maryland corporation for the year 1926.

Based upon this statement of facts, the Commission asks the questions following:

"(a) Does the payment of the tax assessed against the Ohio corporation exempt the stock of the Maryland corporation from taxation in this state for the current year?

(b) If an election has been made by a foreign corporation, may such election be withdrawn either before or after the basis of the tax has been certified to the Auditor of State?"

The Tax Commission has assessed both corporations for taxation in 1926, and they have made application to the Commission for a review of its findings, claiming that a payment of these two fees would be a duplication of a tax on the same assets. These assets were owned by the Ohio corporation on January 1, 1926. They were transferred by the Ohio corporation to the Maryland corporation on April 1, 1926. The Ohio stockholders in the Ohio corporation were not required to list their stock for taxation in 1926. The franchise tax was assessed. The assets of the Ohio corporation were sold to the Maryland corporation April 1, 1926.

Is the stock held by the shareholders of the Maryland corporation exempt from taxation because said shares represent an interest in the same assets as the Ohio corporation?

Section 5519, General Code, provides that,

"a corporation shall not be required to file its first annual report under section 106-115 (G. C. 5459-5504), inclusive of this act, until the proper month, hereinafter provided, for the filing of such report, next following the expiration of six months from the date of filing articles of incorporation or admission to do business in this state."

In the brief prepared by counsel for the Maryland corporation, it is stated that

"section 5519 provides that a domestic corporation incorporated within six months prior to April, 1926, and a foreign corporation admitted to do business within the same period, are not required to pay franchise taxes until 1927."

It is believed that said construction of said section is not warranted. It is clear under said section that it is optional with the corporation as to whether it files the report; but when the report is filed it then comes within the provisions of section 192, General Code.

On March 29, 1926, the Maryland corporation filed with the Tax Commission of Ohio an election under the provisions of section 192, General Code, as follows:

"The National Cash Register Company, a corporation organized and existing under the laws of the State of Maryland, desiring to comply with Section 192 of the General Code of Ohio and thus to relieve its stockholders from being required to list their stock for taxation, does hereby elect to pay and will pay annually for the privilege of exercising its franchise in Ohio a franchise tax at the times, in the manner, on the basis, and in the amount provided by law for domestic corporations."

Section 192, General Code, provides as follows:

"No person shall be required to list for taxation a share of the capital stock of an Ohio corporation; or a share of the capital stock of a foreign corporation, the property of which is taxed in Ohio in the name of such corporation; or a share of the capital stock of any other foreign corporation provided such corporation, for the privilege of exercising its franchise in Ohio, elects to pay and pays annually a franchise tax at the times, in the manner on the basis and in the amount prescribed by law for domestic corporations. Any such foreign corporation may elect, on or before April 11, 1925, to pay within one hundred days after the passage of this act, the amount of franchise tax for the year 1924 as provided for domestic corporations, and upon such election, as evidenced by written notification to the tax commission of Ohio by such corporation on or before said 11th day of April, 1925, the holders of the capital stock, of such corporation shall not be required to list for taxation or pay the tax on the shares of the capital stock of such corporation for the year 1924. With such notification of election, such corporation shall report to the commission, under the oath of its president or other chief officer, the information required by law for domestic corporations, and the commission shall thereupon certify to the auditor of state the amount of subscribed or issued and outstanding capital stock of any such corporation and a franchise fee shall be charged thereon and collected as provided in the case of domestic corporations."

It is noted that said Maryland corporation in its election to pay franchise taxes, states that it desires to relieve its stockholders from being required to list their stock for taxation; and in order to obtain said relief they elect to pay and will pay annually the franchise tax.

It is also noted that section 192, General Code, provides that shares of stock of foreign corporations are not required to be listed for taxation, if such foreign corporation for the privilege of exercising its franchise in Ohio elects to pay and pays annually a franchise tax at the times, in the manner, on the basis, and in the amount prescribed by law for domestic corporations.

It is evident that the shares of stock of the Maryland corporation must be listed for taxation unless said corporation complies with the provisions of Section 192, General Code. In order to comply with said section, said corporation must elect to pay and pay annually the franchise tax.

It is true that corporations formed within six months of the time for filing the report and making the election cannot be required to report until the proper month next following the expiration of the six months from the date of admission to do business in this state. It is also true that if they do not report and elect as provided in section 192, that their stock must be listed for taxation.

The Maryland corporation on March 29, 1926, elected to pay the franchise tax, but it now claims that no tax is payable until 1927.

The object of the report is to furnish the tax commission a basis for assessing the tax. The election exempts the shareholders from listing the shares for taxation, and upon the failure of payment of the tax, the county auditor, under the provisions of section 5393, General Code, may list the stock as omitted property.

As before stated herein, if no report and election is made, the stockholder "must list the stock for taxation.

The Maryland corporation contends that although it has reported and elected to pay, yet it should pay no taxes for 1926 as its stock is based upon the same assets as a domestic corporation which operated for three months, and was assessed a franchise tax for 1926. The assets may be the same, but nevertheless there are two separate and distinct corporations; one domestic, one foreign. Does the assessment of franchise tax against a domestic corporation exempt shareholders in a foreign corporation from listing their stock? This certainly would be a strained construction of section 192.

The assessment of the franchise taxes against the domestic corporation was for the year 1926; this tax is payable by said domestic corporation, although said corporation transferred its assets April 1, 1926, and went out of business. A transfer of its assets by a domestic corporation during the current year does not authorize a rebate of its annual franchise tax.

The only authority for an apportionment of the franchise tax is found in section 5495, General Code, which provides for the report in writing to the Tax Commission, and also reads:

"* * * provided, however, that if any such corporation shall be adjudicated a bankrupt or a receiver shall be appointed therefor or a general assignment shall be made thereby for the benefit of creditors, such corporation shall file the report herein provided but it shall not be charged with any fee as hereinafter specified except for the portion of the then current year and of subsequent years during which such corporation had the power to exercise its corporate franchise unimpaired by such proceedings or act."

Counsel for the Maryland corporation have cited and quoted from an opinion of this department rendered April 13, 1926, to The State Tax Commission construing section 192, General Code. This opinion was rendered in answer to the commission's question as to whether foreign corporations under the provisions of section 5519, General Code, could exempt their stock for 1926, in the hands of Ohio shareholders by filing a report and electing to pay a franchise tax as domestic corporations. In ruling in the affirmative on the above question, the said opinion (Opinion 1926, No. 3263)-stated that:

"A foreign corporation authorized to do business in this state after October 31, 1925, and prior to April 11, 1926, is not, under the provisions of section 5519 G. C., required to file a report nor pay a franchise tax until 1927. It may, however, elect to report for the year 1926 and to pay a franchise tax for that year on the same basis as an Ohio corporation. The Tax Commission should accept this report when tendered and such acceptance of the report and the payment of the franchise tax will exempt the person owning such stock from listing the same for taxation."

It is also stated in said opinion that:

"As before stated, the payment of the franchise tax by the foreign corporation is for the current year, and not for the following year."

The Maryland corporation could not be required under 5519, General Code, to report and elect at the time it did; but it voluntarily elected to pay the franchise tax in order to exempt its Ohio shareholders from listing their stock for taxation. The corporation claims its election was intended for 1927. If so, the stock is not exempt from listing in 1926. The election was to pay the franchise tax; and the payment of the franchise tax by a foreign corporation is for the current year. The payment of its franchise tax by the National Cash Register Company of Ohio for 1926, will not exempt the stock of The National Cash Register Company of Maryland (which took over the assets of the Ohio corporation April 1, 1926) from taxation in Ohio for the current year.

The commission's second question is whether

"if an election has been made by a foreign corporation, such election may be withdrawn either before or after the basis of the tax has been certified to the auditor of state?"

When the election is filed, it fixes the status of the stock of the Ohio shareholders; that is, it exempts said stock from being listed by said shareholders for taxation in Ohio; it also obligates the foreign corporation so electing, to pay the franchise tax. After said election is made, and the status of said stock is fixed, it is not believed that the foreign corporation may withdraw its election.

However, nothing appears in the brief of the Maryland corporation to suggest their desire to withdraw their election.

It is therefor believed that when an election under section 192, General Code, has been filed with the Tax Commission, said election may not be withdrawn.

Respectfully,

C. C. CRABBE,

Attorney-General.

3917.

DISAPPROVAL, BONDS OF YORK TOWNSHIP RURAL SCHOOL DISTRICT, BELMONT COUNTY, \$3,000.00.

COLUMBUS, OHIO, December 29, 1926.

Re: Bonds of York Township Rural School District, Belmont County, \$3,000.00.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have examined the transcript of proceedings for the foregoing issue of bonds and find the same cannot be approved for the following reasons:

1. The affidavit of the publisher recited that the notice of the sale of the bonds shall be published for three weeks, commencing September 4, 1926, and giving notice of the sale of the bonds on September 29, 1926.

In the case of State of Ohio v. Kuhner and King, 107 O. S., page 406, the court held: