649.

LIFE INSURANCE — FOREIGN COMPANIES—ANNUITIES TAXATION — DIVISIBLE SURPLUS — ADDITIONAL INSURANCE, TAXED WHEN — WAIVER OF PREMIUMS — CREDITS TAXED WHEN.

SYLLABUS:

1. *Moneys received for annuities in Ohio by foreign life insurance companies are not taxable as premiums under Sections* 5432 *and* 5433, *General Code.*

2. *The proportionate annual participation in the divisible surplus of foreign life insurance corporations (so-called dividends) which are used to purchase paid-up additional insurance or are left with the insurance companies to accumulate for the purpose of accelerating the endowment or paid-up maturity dates of policies covering risks within this state, are not taxable as premiums.*

3. *When policies issued by foreign life insurance corporations provide for the waiver of premiums in the event of disability, the credits for such premiums which are granted such policyholders on policies covering risks within this state, are not taxable as premiums.*

COLUMBUS, OHIO, May 25, 1937.

HON. ROBERT L. BOWEN, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR: This will acknowledge receipt of your letter of recent date which reads as follows:

> "We would appreciate receiving your opinion on the following questions regarding the application of Ohio General Code Sections 5432, et seq.:
>
> 1. Are moneys received for annuities in Ohio by foreign life insurance corporations taxable as premiums?
>
> 2. Are the proportionate annual participations in the divisible surplus of foreign life insurance corporations (so-called 'dividends'), which are used to purchase paid-up additions to existing life insurance policies covering risks within this state, taxable as premiums?
>
> 3. Are the proportionate annual participations in the divisible surplus of foreign life insurance corporations (so-called 'dividends'), which are left with the corporations to accumulate

and used to accelerate the endowment, or paid-up, maturity dates of the policies covering risks within this state, taxable as premiums?

4. When policies issued by foreign life insurance corporations provide for the waiver of premiums in the event of disability, are the credits for such premiums which are granted to policies covering risks within this state taxable as premiums?"

It is necessary for a proper determination of the questions presented by your letter to consider Section 5432, General Code, the pertinent part of which reads as follows:

"Every insurance company incorporated by the authority of another state or government, in its annual statement to the superintendent of insurance, shall set forth the gross amount of premiums received by it from policies covering risks within this state during the preceding calendar year, without any deductions whatever. It shall also set forth therein in separate items, return premiums paid for cancellations and considerations both paid to or received from other companies for reinsurances in this state during such year. * * *"

Section 5433, General Code, authorizes the Superintendent to charge as a tax upon the business done by a foreign life insurance company in this state for a period shown by its annual statement an amount of 2½% of the balance of gross premiums after allowing certain deductions.

Certain foreign life insurance companies provide several options which may be exercised by policyholders for the disposition of earned dividends. One of such options may be the application of earned dividends to the purchase of paid-up additional insurance. Under another option, earned dividends may be left with the insurance company to accumulate and used to accelerate the endowment or the maturity date of the policy. Some insurance companies for a small additional premium provide in their contracts for the waiver of all premiums in the event of disability. In such cases the life insurance companies, from a reserve fund established for that purpose, pay the premium during the disability of the policyholder.

The only problem presented by questions 2, 3 and 4 is whether or not the term "gross amount of premiums received" as used in Section 5432, supra, contemplates only the premium stated on the face of the policy or in addition thereto includes the earned dividends or credits used for the purposes stated in your letter.

The Supreme Court in the case of *State* vs. *Tomlinson,* 99 O. S. 235, discussed the clause "gross amount of premiums received by it from policies covering risks within this state * * without * * any deduction whatever" in Section 5432, General Code, as enacted in 110 O. L. 66. This section was amended in 115 O. L. 200. However, the clause above referred to and considered by the court was not changed by the amendment. The legislature by an enactment in 90 O. L. 201, placed its own interpretation upon the term "amount of the gross premium and assessment receipts". The court, in concluding that there is no distinction between the use of the term "amount of the gross premium and assessment receipts" and the term "gross amount of premiums received" as used in the statute under consideration, said at page 237:

> "The term 'amount of the gross premium and assessment receipts' as used by the legislature in that enactment has been carried either in that phraseology, or in the phraseology of the present statute, in the successive amendments and enactments upon that subject.
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> * * * * * * * * *
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> If the legislature had the power to fix as the basis of taxation the gross premium stipulated on the face of the policy, and it clearly appears from the reading of the statute now in force, in the light of the previous expressions of the legislature upon the same subject, that the legislature by the use of the term 'gross premiums' *did intend the gross premiums stipulated on the face of its policies,* then it is the duty of the court to carry out such intent, upon the principle that where the legislature has by previous enactment expressly or by clear and indubitable implication defined the meaning of a phrase it is presumed thereafter to have used the same phrase in connection with the same subject in the same sense." (Italics the writer's)

I am of the opinion, in view of the above, that you are not authorized to add to the premium stipulated on the face of the policy earned dividends or credits used for the purposes stated in your letter for the purpose of computing a tax on the gross premiums received by foreign life insurance companies.

The problem presented by your first question is entirely different from the one presented by the other three. For the purpose of this opinion, I am assuming that in referring to annuities you do not mean a form of contract in which the terms may appear to contemplate both life insurance and provisions of annuities.

In order to determine whether the revenue received from annuity contracts is taxable, it is first necessary to consider what is meant by the term "premium". Webster's New International Dictionary defines "premium" as the term is used in connection with insurance as follows:

> "The consideration paid, whether in money or otherwise, for a contract of insurance."

In Ohio Jurisprudence, Vol. 22, page 494, "premium" is defined in the following language:

> "In the law of insurance the premium * * ordinarily is the agreed price for assuming and carrying the risk; that is, the consideration paid an insurer for undertaking to indemnify insured against a specific peril."

From the above definitions, it is apparent that the term "premium" has a definite meaning and is applicable solely to considerations paid for contracts of insurance.

The question next presents itself as to whether an annuity contract is a contract of insurance.

In the case of *Chisholm* vs. *Shields,* 67 O. S. 374, it is held:

> "An annuity, as understood in common parlance, is an obligation by a person or company to pay the annuitant a certain sum of money at stated times, during life or a specified number of years, in consideration of a gross sum paid for such obligation."

In Corpus Juris, Vol. 3, page 202, the following distinction is made between an annuity contract and a life insurance contract:

> "An annuity contract differs from one for life insurance in that the latter provides for the payment of a lump sum conditionally in consideration of periodical payments by the insured, while the former contemplates periodical payments of an annual amount, purchased by the annuitant for a stated sum. It has consequently been held that the rules applicable to life insurance do not govern an annuity contract."

In 63 A. L. R. 79, I find the following statement regarding annuity contracts:

> "Contracts for annuities differ materially from ordinary insurance policies and are not generally regarded as such,

> so that a company engaged merely in selling annuities does not conduct an insurance business, and is not an insurance company."

The Attorney General in 1933 Opinions of the Attorney General, Vol III, page 1950, upon considering the question as to whether or not the issuance of annuity contracts constituted engaging in the insurance business, said that the issuance of an annuity is not necessarily in and of itself insurance business.

The power to make insurance contracts and to grant annuities seems to be recognized as entirely distinct in Section 9339, General Code, providing for the incorporation of insurance companies, for in this section the legislature authorized thirteen or more persons to form a corporation "to make insurance upon the lives of individuals and every insurance appertaining thereto or connected therewith on a mutual or stock plan *and grant, purchase or dispose of annuities.*" This is significant in that the legislature of Ohio did not assume that the power to make insurance contracts conferred authority to grant, purchase or dispose of annuities. Such authority is expressly added in the above section.

In view of the foregoing, it is quite apparent that life insurance contracts and annuity contracts are entirely different with distinct characteristics.

The Supreme Court of Ohio in the case of *State* vs. *Railway Co.*, 68 O. S. 9, in considering the question of insurance contracts, said at page 30:

> "In the parlance of the business of insurance, ordinarily the contract is called a policy; the consideration paid, the premium; and the events insured against are called 'risks and perils'."

It is to be observed that the legislature in enacting Section 5432 used such terms as employed by the Supreme Court in speaking of insurance contracts. Consequently, the provision *"amount of premiums received by it from policies covering risks"* as used in Section 5432, General Code, exhibits a legislative intent to tax only premiums received from the business of insurance.

A diligent search of the Ohio authorities fails to disclose an expression by the courts of this state on the question of whether or not moneys received for annuities are taxable as premiums. The authorities of other jurisdictions seem to be in conflict regarding this matter.

The Supreme Court of Iowa in the recent case of *Northwestern Mutual Life Insurance Co.* vs. *Murphy, Commisioner of Insurance,* 271 N.W. 899, held that revenues received for annuities are taxable. However, the decision was based on a statute entirely different from Section 5432, General Code, in that the Iowa statute provided for a tax on the amount of premiums received by an insurance company "for business done" in that state.

The courts of New York and Pennsylvania took the view that the term "premium" as used in insurance statutes had a definite meaning and is applicable solely to considerations paid for contracts of insurance.

In the case of *Metropolitan Life Insurance Co.* vs. *Knapp,* 193 App. Div. 413 (N. Y.), which case was affirmed by the Court of Appeals of New York in 231 N. Y. 630, the court held as disclosed by the first branch of the syllabus:

> "Sums of money received by a life insurance company from the sale of annuities * * * are not to be regarded as 'premiums' so as to enter the computation which determines the franchise tax assessable against such company * * *."

The Supreme Court of Pennsylvania took the same view in the case of *Commonwealth* vs. *Metropolitan Life Insurance Co.,* 254 Pa. St. 510, and held "a foreign insurance company is not taxable with respect to the consideration money received by it for granting annuities."

The statutes involved in the New York and Pennsylvania cases were similar to Section 5432, General Code, in that the tax was measured by premiums received on insurance policies and not on the business done as was the case in Iowa. There is no provision in Section 5432, supra, which would indicate that the legislature intended to include moneys received for annuities as gross premiums for the purpose of taxation. To the contrary, it is apparent that from the language "gross premiums from policies covering risks," the legislature intended exclusively a tax on insurance.

It is well settled in this state that tax statutes must be strictly construed in favor of taxpayers. *Cassidy* vs. *Ellerhorst,* 110 O. S. 535.

It is therefore my opinion that moneys received by life insurance companies for annuities are not taxable as premiums under Section 5432, General Code.

Respectfully,

HERBERT S. DUFFY,

Attorney General.