1095.

APPROVAL, NOTES OF PLEASANT TOWNSHIP RURAL SCHOOL DISTRICT, PERRY COUNTY, OHIO—$5,569.00.

COLUMBUS, OHIO, July 24, 1933.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

1096.

FRANCHISE TAX—FOREIGN CORPORATION SALES FROM WAREHOUSE WITHIN THIS STATE SUBJECT TO TAX, ALTHOUGH GOODS MANUFACTURED WITHOUT STATE NOT SUBJECT TO FRANCHISE TAX.

SYLLABUS:

Sales made by a foreign corporation from a stock of goods in a warehouse in this state of goods manufactured by the corporation at its factory in the state of its domicile, represent business done by the corporation in this state for the purpose of determining the franchise tax to be paid by such corporation under the laws of this state.

Sales made by an Ohio corporation from a stock of goods in a warehouse in another state of goods manufactured by the corporation in this state do not represent business done by the corporation in this state for the purpose of determining the franchise tax to be paid by such corporation. Where an Ohio corporation having a factory in this state sells goods from a stock of goods in a factory which the corporation owns and operates in another state, sales so made constitute the doing of business by the corporation in such other state, and do not represent business done by the corporation in this state for franchise tax purposes, although such sales are made on orders which are required to be confirmed by the corporation at its principal office in Ohio.

In each and all of the questions discussed in this opinion it is assumed that the goods sold by the corporation from a stock of goods located in a state other than that in which the corporation has its domicile were not shipped by the corporation from its factory in the state of its domicile for the purpose of filling orders previously taken for the purchase of such goods.

COLUMBUS, OHIO, July 24, 1933.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—This is to acknowledge the receipt of a communication from you which reads as follows:

> "I have been directed by the commission to request your formal opinion with respect to the corporation franchise tax. The facts in the case are as follows:
>
> A Pennsylvania corporation, qualified to transact business in Ohio, with a manufacturing plant in Pennsylvania, ships its manufactured product to an Ohio warehouse from which point sales are made and

goods delivered in execution of such contracts from the Ohio warehouse. Is the business done from the Ohio warehouse to be considered Ohio business for the purpose of determining the Ohio franchise tax?

2. Assume that the above corporation is incorporated under the laws of Ohio and has its manufacturing plant in this state and ships its manufactured product to a warehouse in Pennsylvania from which point sales and deliveries are made as set forth above—Should the business done from the Pennsylvania warehouse be considered to be Ohio business?"

The questions presented in your communication relate to the assessment of franchise taxes upon a foreign corporation and a domestic corporation, respectively, on the facts therein stated. Various questions relating to the assessment of franchise taxes on corporations have been the subject of opinions of this office from the time of the enactment of the original Willis Act down to the present time. You are familiar with these opinions, and no review of the same will be here made.

The questions here presented, like many other questions relating to the taxation of corporations, involve in measure a consideration of the power and jurisdiction of the state to levy taxes of this kind, and of the limitations on such power and jurisdiction. One of the fundamental limitations on the taxing power of a state is that it can extend only to property or other subjects of taxation within the state's jurisdiction. "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property and business." State Tax on Foreign Held Bonds, 15 Wall. (U. S.) 300; *Union Refrigerator Transit Company* vs. *Kentucky,* 199 U. S. 194.

In this connection, it is noted that the franchise tax assessed against a domestic corporation is for the privilege such corporation has of exercising its franchise during the calendar year in which the tax is payable, and the franchise tax assessed against a foreign corporation is for the privilege such corporation has of doing business in this state or of owning or using a part or all of its capital or property in this state or for holding its certificate of compliance with the laws of this state authorizing it to do business in this state, during the calendar year in which such tax is payable. Section 5495, General Code. Whether such tax be one upon a domestic corporation or upon a foreign corporation, the tax is levied at the rate provided for in section 5499, General Code, upon that part of the value of the issued and outstanding shares of stock of the corporation as is represented by property owned or used by the corporation in this state and by the value of the business done by the corporation in this state during the year preceding the date of the commencement of the current annual accounting period of such corporation; and, as to this, it is further provided that as to a domestic corporation all of its business except extra-state business shall be considered as business done in this state for the purpose of such computation. Sections 5497 and 5498, General Code. In other words, in determining that part of the value of the issued and outstanding shares of stock of a corporation, whether domestic or foreign, represented by property owned and used and business done by the corporation in this state, two separate fractions are used, a property fraction and a business fraction.

The questions presented in your communication relate only to the business fraction of the equation used in determining the part of the value of the issued and outstanding shares of stock to which the prescribed rate is applied. The first question relates to the assessment of a franchise tax upon a foreign cor-

poration engaged in the business of manufacturing which has its factory in the state of its domicile but which sells its manufactured goods from a stock of such goods in a warehouse in this state. In this situation, the question presented is whether the business done by such corporation in selling its manufactured products from such warehouse is to be considered Ohio business for the purpose of determining the franchise tax on the corporation under the laws of this state. If, as I assume from your question, this corporation is regularly selling its products from a stock of goods maintained by it in a warehouse in this state, there can be no question but that such corporation is doing business in this state so as to confer upon this state jurisdiction and authority to impose a tax upon the corporation with respect to such business, and that the sales made by the corporation from its stock of goods and warehouse in this way is business done by the corporation in this state under the sections of the General Code providing for the particular tax here under consideration. See Opinions of the Attorney General for 1915, Vol. I, page 460; Opinions of the Attorney General for 1927, Vol. II, page 1300; section 5328-2, General Code. The value of the business done by such foreign corporation in this way is to be measured by the aggregate amount of the sales made by the corporation from the stock of goods in the warehouse during the period covered by the report which such corporation is required to make under the provisions of section 5497, General Code. It follows from what is here said that your first question should be answered in the affirmative.

The second question presented in your communication is one relating to the assessment of a franchise tax under the laws of this state upon an Ohio corporation which has a factory in this state, and which sells its manufactured products from a stock of goods in a warehouse in another state; and, in this situation, the question presented is whether the business done by the corporation in selling its products from a stock of goods in the warehouse in such other state is to be considered Ohio business for the purpose of determining the franchise tax imposed on the corporation under the laws of this state. From what has been said above, it is obvious that the sale by an Ohio corporation of its manufactured products from a stock of goods in a warehouse in another state constitutes the doing of business by the corporation in such other state, and is extra-state business with respect to Ohio.

It follows, therefore, that business done by an Ohio corporation in another state in the manner above indicated is not to be considered as business done in this state for the purpose of determining the franchise tax to be assessed upon a corporation under the laws of this state. Although, under the rule recognized and applied in the case of *Western Cartridge Company* vs. *Emmerson,* 281 U. S. 511, and under the provisions of section 5497, General Code, the sales made from its factory by an Ohio corporation of products manufactured by it in this state directly to consumers and other customers in this and other states represent business done in Ohio, this is not true with respect to its manufactured products which are shipped from the factory to its warehouse in another state where such products are sold in such manner that the sales represent business done in such other state.

In this connection, it is recognized, of course, that the manufacture in this state of the goods and products which are thereafter shipped to the corporation's warehouse in another state for sale there, is an exercise of the corporation's franchise in this state; and that this state has the power and authority to tax not only the products manufactured but the manufacture as well, although in

the manufacture of the goods it was intended that they should thereafter be sold in interstate commerce or, as in this case, that they should be removed to another state and there sold by the corporation. However, the tax here in question is a franchise tax based in part on the value of the business done by the corporation in this state and, aside from any question of constitutional limitation, the clear implication of the statute is that the business done by the corporation in another state shall not be included as Ohio business in the determination of the tax. The sales here in question do not represent business done in Ohio, and your second question should be answered in the negative.

In addition to the questions stated in your communication, above discussed, my opinion is requested as to the question whether the sale of manufactured goods by an Ohio corporation from a factory in another state on purchase orders requiring confirmation by the corporation at its principal office in this state where it likewise has a factory, is business done in this state for the purpose of determining the franchise tax to be paid by such corporation. Where manufactured products and goods of an Ohio corporation are sold on purchase orders which require the confirmation of the corporation at its office here in Ohio, the contract for the sale of goods covered in such order does not become a valid and binding contract for the sale of such goods until the order is confirmed by the corporation in this state. And, in this view, the contract may be said to be one made in Ohio. But, except as to specific or identified goods, a contract for the sale of goods does not ordinarily constitute a sale of such goods. Ordinarily and in the usual course of business of the sale of manufactured products on purchase orders, a sale of the goods ordered is not effected until such goods have been segregated from the mass or stock of goods in the factory and delivered to the customer or to a carrier for shipment to such customer. 55 Corpus Juris, page 542; *Woods* vs. *McGee,* 7 Ohio, Pt. II, page 127; *Village of Bellefontaine* vs. *Vassaux,* 55 O. S. 323. With respect to this question as well as to your second question, above discussed, the important consideration is not whether contracts for the purchase and sale of goods manufactured by the corporation are made in Ohio or in the other state where the corporation sells such goods from a stock of goods in a warehouse or factory of the corporation there located; but the important question in each of these cases is whether the Ohio corporation is doing business in such other state. *Midland Linseed Products Company* vs. *Warren Brothers Company,* 46 Fed. (2nd) 870, 872. And with respect to both of these questions it may be stated that, assuming that they do not involve the shipment of goods from the factory of the corporation in Ohio to its warehouse or factory in the other state for the purpose of filling orders for such goods previously taken in such other state, it is well settled that sales of its goods made by the corporation from a stock of goods in a warehouse or factory of the corporation in another state constitutes the doing of business by the corporation in such other state. *Cheney Brothers and Company* vs. *Massachusetts,* 246 U. S. 147; *Kehrer* vs. *Stewart,* 197 U. S. 60; *General Oil Company* vs. *Crain,* 209 U. S. 211; *American Steel and Wire Company* vs. *Speed,* 192 U. S. 500; *Midland Linseed Products Company* vs. *Warren Brothers Company,* supra. This business done by the corporation in such other state would be extra-state business with respect to Ohio, and would not represent business done by the corporation in this state for the purpose of determining the franchise tax to be paid by such corporation. It follows, therefore, that your third question should likewise be answered in the negative.

Respectfully,
JOHN W. BRICKER,
Attorney General.