4646.

RECONSTRUCTION FINANCE CORPORATION—INSTRUMENTALITY OF FEDERAL GOVERNMENT—NOT SUBJECT TO STATE TAXATION.

SYLLABUS:

1. *Since the Reconstruction Finance Corporation was organized by virtue of the laws of the federal government, its stock is wholly owned by such government and its obligations are unconditionally guaranteed by the United States Government, such corporation is an instrumentality of the United States and by reason thereof neither the Foreign Corporation Act of Ohio (Sections* 8625-1 *et seq. General Code) nor the other sections of the General Code purporting to levy taxes on corporations doing business in the state of Ohio would be applicable to such corporation except as authorized in such section.*

2. *When an agency of the United States Government, in the performance of the governmental duties placed upon it by federal statute, incorporates subsidiary companies the stock of which is solely owned by such governmental agency, and conducts the operation of its business within the state of Ohio through such instrumentality, such corporation and its franchises are not subject to taxation by the state of Ohio except to the extent set forth in Section* 10 *of the Reconstruction Finance Corporation Act.*

COLUMBUS, OHIO, September 23, 1932.

HON. CLARENCE J. BROWN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your recent request for opinion, as to whether Sections 8625-1 et seq. and Section 5495 as well as other sections of the General Code with reference to taxation, have any application to the Reconstruction Finance Corporation, and likewise, whether such sections and tax laws subject the regional credit corporations to a tax.

The Reconstruction Finance Corporation is organized under an Act of Congress known as the Reconstruction Finance Corporation Act. Its entire capital stock is owned by the United States and all of its obligations are unconditionally guaranteed both as to principal and interest, by the United States.

The rule was established in the case of *McCullough* vs. *Maryland,* 4 Wheaton (U. S.) 405; *Union Pacific* vs. *Penniston,* 18 Wall. (U. S.) 5, that a state had no right to tax the instrumentalities of the federal government. This rule has been consistently followed by the federal courts.

The purpose of this act, as stated in its title, is:

> "To provide emergency financing facilities for financial institutions, to aid in financing agriculture, commerce, and industry, and for other purposes."

The language of the act clearly shows that the sole purpose of its enactment is the creation of a corporation to administer the loan of certain funds of the United States for the purpose and upon the conditions set forth in the act. Congress in creating this corporation, made specific provision that such corporation together with its assets and income, should be exempt from all types of taxation. Section 10 of such act reads as follows:

"Any and all notes, debentures, bonds, or other such obligations issued by the corporation shall be exempt both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. The corporation, including its franchise, its capital, reserves, and surplus, and its income shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; except that any real property of the corporation shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed."

In the case of *McCullough* vs. *Maryland, supra,* the court held that a national bank was an instrumentality of the federal government, for the reason that it was exercising a function of the sovereignty of the federal government in making more elastic the monetary system of the government, and that by reason thereof the states had no right to tax its franchises, or by taxation to impose any burden on its exercise of these functions. Like reasoning applied to the finance corporation would lead to the conclusion that such corporation was likewise a federal instrumentality since its purpose is the loan of federal funds for the purpose of alleviating stringencies in the financial market caused by reason of the inelasticity of our monetary system.

It therefore appears that since the reconstruction finance corporation is solely owned by the United States Government, is operated solely for the purpose of carrying out a federal governmental function and whatever profits arise therefrom become the property of the federal government, the State of Ohio has no authority to tax its franchises.

The federal court has similarly held that when a corporation is organized by the United States Government, all of its stock is owned by the United States Government, and all of its property purchased by the use of government funds, the property of such corporation is not subject to state taxation except to the extent set forth in Section 10, supra. See *United States* vs. *Coughlin,* 261 Fed., 425; *King County* vs. *United States Shipping Board Emergency Fleet Corporation,* 282 Fed., 951; *United States Spruce Production Corporation* vs. *Lincoln County,* 285 Fed., 388; *United States* vs. *Clallan County,* 283 Fed., 645; *United States Shipping Board Emergency Fleet Corporation* vs. *Delaware County, Pennsylvania,* 17 Fed., 2d, 40.

It is therefore apparent that when a corporation is so owned and operated by the United States Government, neither its franchises nor its property is subject to state taxation, except to the extent authorized by such government.

From the corporate structure of these corporations, which you state are to be organized under the Delaware Corporation Act by the Reconstruction Finance Corporation, construed in connection with Section 201 (e) of the Emergency Relief Act of 1932, it appears that each of these corporations must have "a paid-up capital of not less than $3,000,000.00 to be subscribed for by the Reconstruction Finance Corporation" and paid for from funds appropriated by the United States government for such purpose and is to be "managed by officers and agents appointed by the Reconstruction Finance Corporation." Such Section 201 (e) prescribes the authority, powers and duties of such types of corporations:

"The Reconstruction Finance Corporation is further authorized to create in any of the twelve Federal land-bank districts where it may deem the same to be desirable a regional agricultural credit corporation with a paid-up capital of not less than $3,000,000, to be subscribed for by the Reconstruction Finance Corporation and paid for out of the unexpended balance of the amounts allocated and made available to the Secretary of Agriculture under section 2 of the Reconstruction Finance Corporation act. Such corporations shall be managed by officers and agents to be appointed by the Reconstruction Finance Corporation under such rules and regulations as its board of directors may prescribe. Such corporations are hereby authorized and empowered to make loans or advances to farmers and stockmen, the proceeds of which are to be used for an agricultural purpose (including crop production), or for the raising, breeding, fattening, or marketing of livestock, to charge such rates of interest or discount thereon as in their judgment are fair and equitable, subject to the approval of the Reconstruction Finance Corporation and the various Federal reserve banks and Federal intermediate credit banks any paper that they acquire which is eligible for such purpose. All expenses incurred in connection with the operation of such corporations shall be supervised and paid by the Reconstruction Finance Corporation under such rules and regulations as its board of directors may prescribe."

The act authorizes the governmental agency *to create* the regional corporations. An examination of the Federal Constitution does not disclose that such delegation of power to the agency is beyond the power of Congress. Assuming the act to be constitutional, I am unable to discern in the act any limitation on the manner in which the regional corporations are to be created; that is, the act does not specifically require that the charter of the regional corporations be procured from Congress or from any one state or all of the states within a federal land bank district. I am therefore of the opinion that the federal government intended to give to the Reconstruction Finance Corporation the choice of any appropriate means of carrying out the powers granted by Congress.

If I am correct in my conclusions, to use the language contained in the tenth and eleventh paragraphs of the headnotes of *McCullough* vs. *Maryland* as reported in 4 L. Ed., section 579:

"The state governments have no right to tax any of the constitutional means employed by the government of the Union to exercise its constitutional powers.

The states have no power, by taxation or otherwise, to retard, impede, burden, *or in any other manner control the operations* of the constitutional laws enacted by Congress, to carry into effect the powers vested in the national government." (Italics the writer's.)

By the incorporation of the regional corporations instrumentalities of the federal government are created on whose franchises the state has no right to levy a tax or burden and it would appear that if a franchise tax were levied on them such levy would be void. However, are the fees provided in Sections 8625-5, 8625-8 and 176, General Code, a tax on the franchise or are they merely license fees?

An examination of the "Foreign Corporation Act" of Ohio discloses that the

purpose of such act is not to create any new right or power in favor of a foreign corporation about to do business in the State of Ohio. In other words, if a foreign corporation is authorized by its charter only to engage in a certain type of business the mere fact that it complied with the provisions of the Ohio "Foreign Corporation Act" and paid the fees therein provided for would not entitle such foreign corporation to engage in any additional type of business. Prior to the enactment of the Foreign Corporation Act in Ohio, a foreign corporation could come into Ohio and engage in any type of business authorized by its charter, which was not specifically prohibited by Ohio statutes. See *Newburg Petroleum Company* vs. *Weare,* 27 O. S., 343; *American Soap Company* vs. *Bogue,* 114 O. S., 149; *List* vs. *Co-operative Association,* 114 O. S., 361, 387. Such act merely requires that certain types of corporations, before engaging in business, must file certain reports and pay certain fees, and imposes a penalty or fine in the event that the conditions of the act are not complied with. It does not provide that the acts or contracts of such foreign corporation shall be void; it merely denies the aid of the Ohio courts in enforcing the obligations of such contracts until such act has been complied with (Section 8625-1) and provides a penalty for such conduct of business within the state. The purpose of the Ohio Foreign Corporation Act is well stated by Robinson, J., in *American Soap Company* vs. *Bogue,* 114 O. S., 149, 154:

> "Our conclusion is that as foreign corporations doing business in Ohio have always been recognized as having, by the comity of states, both qualification and existence in Ohio, and as the imposition of penalties upon and the withdrawal of rights of such corporation for noncompliance with our statute are not for the purpose of withdrawing that comity, but for the purpose of more effectively securing such compliance, *the doctrine of non-existence and incompetence has no application in Ohio to foreign corporations.*" (Italics the writer's.)

The $100.00 fee required to be paid by the provisions of Section 8625-8, General Code, purports to be in the nature of a license fee and its sole purpose, as such, must necessarily be to control the operations of foreign corporations. As stated in the eleventh paragraph of the headnotes of the case of *McCullough* vs. *Maryland,* quoted above, the states have no right to in any manner control these operations. The tax required by the provisions of Sections 8625-8 and 8625-9, General Code, to be paid, is clearly a franchise or excise fee based theoretically on the amount of capital employed in Ohio business and is at the same rates as the excise tax on domestic corporations. I am of the opinion that this fee also violates the rule laid down in *McCullough* vs. *Maryland, supra.*

Section 5495, General Code, specifically states that the fee therein charged is "for the privilege of exercising its franchise" or "for the privilege of doing business in this state" and is clearly a franchise tax which the state of Ohio may not levy on a governmental agency.

Specifically answering your inquiry, it is my opinion that:

1. Since the Reconstruction Finance Corporation is organized by virtue of the laws of the federal government, its stock is wholly owned by such government and its obligations are unconditionally guaranteed by the United States Government, such corporation is an instrumentality of the United States and by reason thereof neither the Foreign Corporation Act of Ohio (Sections 8625-1 et seq. General Code) nor the other sections of the General Code purporting to

levy taxes on corporations doing business in the state of Ohio would be applicable to such corporation except as authorized in such section.

2. When an agency of the Untied States Government, in the performance of the governmental duties placed upon it by federal statute, incorporates subsidiary companies the stock of which is solely owned by such governmental agency, and conducts the operation of its business within the state of Ohio through such instrumentality, such corporation and its franchises are not subject to taxation by the state of Ohio except to the extent set forth in Section 10 of the Reconstruction Finance Corporation Act.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4647.

FRATERNAL LODGE—ACCOMMODATING MEMBERS WITH OCCASIONAL MEALS—PERSONAL PROPERTY USED IN SUCH EXEMPT FROM TAXATION.

SYLLABUS:

1. *Where an incorporated fraternal lodge or social club serves occasional meals to members and others, as a matter of convenience, and not for the purpose of gain, profit or income, the tangible personal property used in connection with the preparation and serving of such meals is exempt from taxation by reason of the provisions of Section* 5328, *General Code.*

2. *Where an incorporated fraternal lodge or social club incorporated not for profit, owns taxable property as defined in Am. S. B.* 323, *enacted by the* 89th *General Assembly, such corporation is required to file a return, listing such property so owned.*

COLUMBUS, OHIO, September 23, 1932.

HON. CALVIN CRAWFORD, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR:—Your recent request for opinion reads:

> "1. A corporation, not for profit, organized before the present corporation act was adopted, and before Section 8623-102 of the General Code was enacted, issued certificates of membership which it called certificates of stock. There was no provision of any kind for their redemption.
>
> (a) Must these certificates be returned by the holders as non-productive investments?
>
> (b) Must a corporation file a list of such holders?
>
> 2. An incorporated fraternal lodge and a social club, incorporated not for profit, serves occasional meals to members and others for convenience.
>
> (a) Must the tangible personal property used in connection with such meals be returned for taxation?
>
> (b) Are such corporations required to make any return?"

Your first inquiry pertains to the taxation of intangibles. Section 5372-1,