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FOREIGN BUILDING AND LOAN ASSOCIATION PURCHASING REAL ESTATE MORTGAGE LOANS, UNSECURED PROPERTY IMPROVEMENT LOANS OR MAKING PARTICIPATING MORTGAGE LOANS WITH A DOMESTIC ASSOCIATION, IS DOING BUSINESS IN OHIO SO AS TO REQUIRE IT TO COMPLY WITH THE CERTIFICATE OF AUTHORITY AND ANNUAL FILING FEE REQUIREMENTS, PROVIDED THAT THE TRANSACTION IS NOT A SINGLE ISOLATED ACT—§§1151.64 AND 1155.13, R.C.

SYLLABUS:

A foreign building and loan association which purchases from a domestic association real estate mortgage loans or unsecured property improvement loans made by the domestic association, or which makes participation mortgage loans in conjunction with a domestic association, is doing business in the State of Ohio so as to require it to comply with the certificate of authority and annual filing fee requirements of Sections 1151.64 and 1155.13, Revised Code, provided that the transaction is not merely a single, isolated act.

Columbus, Ohio, August 9, 1961

Hon. Andrew C. Putka
Superintendent of Building and Loan Associations
407 State Office Building, Columbus 15, Ohio

Dear Sir:

I have before me your request for my opinion, which request reads, in part, as follows:

> "1. If a foreign association, bank, or insurance company engages in any of the following activities, does such activity constitute 'doing business in this state' and, thus, come within the purview of Section 1151.64 of the Revised Code, relating to foreign associations?
>
> (a) The purchase of real estate mortage loans made by domestic associations.
>
> (b) The purchase of unsecured property improvement loans made by domestic associations.
>
> (c) The purchase of participation interests in either real estate mortgage loans or unsecured property improvement loans made by domestic corporations.
>
> (d) The making of participation mortgage loans in conjunction with a domestic association.
>
> (e) The foreclosure or enforcement in Ohio of a loan or obligation which it has acquired as indicated in 1(a) to 1(d), inclusive
>
> "2. Do any of the activities referred to in question 1 constitute 'doing business in this state' for the purpose of taxation by the State of Ohio or for the purpose of the Superintendent's collecting annual filing fees pursuant to Section 1155.13 of the Revised Code?
>
> "3. Would a foreign association which has not obtained a certificate of authority to do business in this state pursuant to Section 1151.64 of the Revised Code be barred from the use of Ohio courts in any attempt by it to foreclose or enforce in Ohio a loan or obligation which it acquired as indicated in 1(a) to 1(d), inclusive?
>
> "4. If such foreign association acquires the real estate security for a loan, either through foreclosure or by deed, is there any limitation as to the length of time such security may be retained by such association?

> "5. If a federal association or national bank whose home office is not located in the State of Ohio engages in any of the association activities referred to in 1(a) to 1(e), inclusive, would such non-resident corporation be subject to the provisions of Sections 1151.02 to 1151.55, inclusive, of the Revised Code?"

In subsequent communications you have also requested my views on whether my conclusions to any of the foregoing questions would be altered depending on whether the purchased loans were serviced by a local Ohio institution for and on behalf of the foreign institution, or whether the foreign institution itself serviced the loans to the extent of making collections thereon and receiving periodic payment.

In answering your questions concerning the activities of foreign building and loan associations, I shall presume that your questions relate only to those foreign associations which have been chartered by other states and not to federally chartered associations operating pursuant to the Home Owners' Loan Act of 1933. I make this presumption in full cognizance of recently enacted Amended House Bill No. 148, effective July 31, 1961, which amended Section 1151.01, Revised Code, to define domestic and foreign building and loan associations, as follows:

> "(B) 'Domestic association' means a building and loan association organized under the laws of this state * * * *or the 'Home Owners' Loan Act of 1933.'* 48 *Stat.* 128, 12 U.S.C.A. 1461, *and amendments thereto, the house office of which is located outside this state.*
>
> "(C) *'Foreign association' means a building and loan association, the home office of which is located outside this state."*
> (Emphasis of new language added)

By this amendment the General Assembly apparently intended to make federally chartered savings and loan associations, which have a home office either in or without this state, subject to all the provisions in the state building and loan association regulatory laws, Sections 1151.01 through 1151.64, Revised Code. While it is not the usual practice of the Attorney General to comment on the constitutionality of statutes which are the subject of opinion requests, I would not be completely candid were I not to point out that the effect of this legislation is apparently in direct conflict with the Home Owners' Loan Act of 1933, 48 Stat., 128, as amended and the cases which have construed this law. See *First Federal Savings and Loan Association of Wisc., v. Martin,* 97 F. (2d), 831, (1938)

121 A. L. R., 99 and also *People v. Coast Federal Savings and Loan Ass'n.*, 98 Fed. Supp., 311, in which federal savings and loan associations have been held to be not subject to control by state regulatory statutes. For this reason, in the remainder of this opinion, I shall limit my comments to the activities of associations chartered by foreign states.

I shall also not discuss foreign banks or insurance companies but shall limit the opinion to building and loan associations with which the Division of Building and Loan Associations is concerned.

As to the question of the purchase by a foreign association of participating interests in loans made by a domestic association, an amendment to Section 1151.64, Revised Code, contained in Amended House Bill No. 148 of the 104th General Assembly, disposes of this question. As amended, Section 1151.64, Revised Code, reads, in part, as follows:

> "(A) Foreign building and loan associations doing business in this state shall conduct such business in accordance with the laws governing domestic building and loan associations. *For the purpose of this section and any other law of this state restricting or relating to the doing of business in this state by foreign corporations, a foreign association shall not be considered to be doing business in this state by reason of the purchase of participating interests in loans made by a domestic association.* * * *"
> (Emphasis added)

As this amendment became effective July 31, 1961, I will make no further reference to the purchase of participating interests in existing loans.

As to the purchase of real estate mortgage loans or unsecured property improvement loans, it should be noted that the question of whether such activity constitutes doing business in this state has three major aspects. The first involves Chapter 1703., Revised Code, which constitutes the Foreign Corporations Law of Ohio. This chapter provides for the licensing of certain foreign corporations prior to such corporations doing business in Ohio. The effect of failure to secure such license may be either a monetary forfeiture under Section 1703.28, Revised Code, or the inability to have recourse to Ohio courts to enforce obligations, or criminal penalties imposed upon officers of the corporation. The second aspect arises under Section 5733.01, *et seq.*, the franchise tax law, which imposes a fee on an association "for the privilege of doing business in this state, owning or using a part of all of its capital or property in this state, or holding a certificate of compliance with the laws of this state authorizing it to do

business in this state during the calendar year in which such fee is payable." The third effect of doing business in the state involves Chapter 1151., Revised Code, the building and loan regulatory laws. Section 1151.64, Revised Code, reads in part, as noted above and then continues as follows:

> "No foreign building and loan association shall do business in this state until it procures from the superintendent of building and loan associations a certificate of authority to do so, * * *"

The most easily resolved aspect of this problem is that relating to the foreign corporation law. Section 1703.02, Revised Code, reads as follows:

> "Sections 1703.01 to 1703.31, inclusive, of the Revised Code do not apply to corporations engaged in this state solely in interstate commerce, including the installation, demonstration, or repair of machinery or equipment sold by them in interstate commerce, by engineers, or by employees especially experienced as to such machinery or equipment, as part thereof; to banks, trust companies, *building and loan associations,* title guarantee and trust companies, bond investment companies, and insurance companies; or to public utility companies engaged in this state in interstate commerce." (Emphasis added)

By this section building and loan associations are expressly exempted from the Ohio foreign corporation law with the result that they are not qualified to secure a license from the Secretary of State before doing business in Ohio.

This does not mean, however, that such a foreign corporation may disregard all Ohio regulatory laws. There is no such exemption found in Chapter 5733., Revised Code, or in Chapter 1151., Revised Code. In fact, expressly to the contrary, it may well be reasoned that the purpose for exempting foreign building and loan associations from the Foreign Corporation Law is that registration and supervision of such associations doing business in Ohio is expressly provided in Section 1151.64, Revised Code.

As to the second aspect of doing business in Ohio, i. e., the necessity for payment of the Ohio franchise tax pursuant to Section 5733.01, Revised Code, this matter was considered in Opinion No. 1078, Opinions of the Attorney General for 1918, Vol. I, page 417. In that opinion the question concerned a corporation organized for the purpose of buying, selling and investing in mortgages and other real estate securities. This company

desired to purchase mortgages in Ohio already in existence and to employ an agent in Ohio to give receipts and collect moneys due. The precursor of Section 5733.01, Revised Code, construed by the Attorney General in that opinion, applied to corporations "owning or using a part of all of its capital in this state and doing business in this state," but did not include the phrase "holding a certificate of compliance with the laws of this state," which phrase is now included in Section 5733.01, Revised Code. As to whether the purpose of mortgage loans in Ohio was "using capital" or doing business in this state, the Attorney General there held that the purchase by a foreign corporation, which does not maintain an office in Ohio, of an existing real estate mortgage, even if the company proposed to service such mortgage loan by its own agent in Ohio, was not doing business or using capital in such manner as to bring it within the meaning of those terms as used in the corporate franchise law, Section 5733.01, Revised Code.

As to whether this opinion is still valid law I am not called upon to decide. Section 5733.01, Revised Code, now also includes the phrase "holding a certificate of compliance with the laws of this state." If a foreign building and loan association is required to secure a certificate of compliance with the laws of this state authorizing it to do business here, it would necessarily follow that it is amenable to the franchise tax imposed by Section 5733.01, Revised Code.

This brings our attention to the question of compliance with Section 1151.64, Revised Code. As quoted above, Section 1151.64, Revised Code, requires a foreign building and loan association, which proposes to do business in this state to procure from the Superintendent of Building and Loan Associations a certificate of authority to do so. What, then, constitutes the doing of business in Ohio by a foreign association? While I have been unable to locate any judicial decisions in Ohio, construing "doing business in this state" as far as building and loan associations are concerned, it is my opinion that the meaning of this pharase as used in Section 1151.64, Revised Code, is the same as that attributed to the similar phrase used in Section 1703.03, Revised Code. The fact that a building and loan is specifically exempted from the coverage of this latter section while being subject to similar provisions in Section 1151.64, Revised Code, does not in any way alter the validity of this analogy. As far as the meaning of "doing business" under Section 1703.03, Revised Code, there is ample authority. The general rules applicable in most jurisdictions concerning

what is "doing business" apply in Ohio. A foreign corporation will not be considered to be doing business in this state by isolated or infrequently repeated acts. Whether a foreign corporation is doing business in this state is a question of fact to be determined on the basis of all the peculiar circumstances in a given case. See 13 Ohio Jurisprudence 2d, 589. The facts which you have suggested in the present case, i. e., the purchase of already existing mortgage loans and the servicing of such loans by an agent or an employee of the foreign association purchaser presents a situation very similar to the one construed by one of my predecessors in Opinion No. 1421, Opinions of the Attorney General for 1952, page 364. In that opinion, the then Attorney General was confronted with the exact facts which you have related with the exception that the foreign institution was a bank incorporated under the laws of another state instead of a foreign building and loan association. In that case the laws prohibited a foreign bank from doing any business other than the lending of money. The Attorney General was apparently of the opinion that the purchasing and servicing of mortgage loans was doing business in this state but also constituted the lending of money, an activity expressly permitted by statute. He concluded that as banks, like building and loan associations, were exempted from the provisions of Section 1703.03, Revised Code, and as there was no provision in the banking laws similar to the requirement of a certification of authority to do business found in Section 1151.64, Revised Code, a foreign bank could do the business of lending money without procuring a license. This opinion is directly applicable to the present facts with the one difference, that if purchasing and/or servicing mortgage loans constitutes doing business, a foreign association is required by Section 1151.64, Revised Code, to procure a certificate of authority. Similarly, Opinion No. 578, Opinions of the Attorney General for 1949, page 282, comes to an analogous conclusion on somewhat different facts. In that opinion the question resolved was whether a foreign corporation organized for the purpose of dealing in motor transport terminals, warehouses, and service stations required a license to do business in Ohio when it purchased Ohio real property and leased it to other foreign corporations. In that opinion the Attorney General reasoned as follows:

> "The principle to which I alluded in the preceding sentence may be stated either as a general rule, viz., that a corporation is doing business within a state when it engages in its regular corporate business, or it may be stated as an exception to the rule concerning more acquisition of real property. See Fletcher Cyc.

Corp., Vol. 17, perm. ed., Foreign Corporations, section 8486, p. 524. See also sections 8466 and 8485.

> " 'In purchasing, acquiring or dealing in real property within the state, a foreign corporation would undoubtedly be doing business there, within the meaning of regulatory laws, when the transaction is in fulfillment of its corporate purposes and a part of its ordinary business.'

"In fact situations such as are presented by the instant inquiry I am inclined to the view that the controlling question should be, is the foreign corporation engaged in transacing business, or any part thereof, that it was created or organized to transact? This test has been cited with approval in Spurlock v. Knight & Son, Inc., 13 So. 2d 396, 244 Ala. 364; Crites et al. v. Associated Frozen Food Packers, Inc. et al., 191 P. 2d 650, 654; also see 23 Am. Jur., Foreign Corporations, sections 365 and 372. See Asbury Hospital v. Cass County et al., 7 N. W. 2d 438, 448, citing other cases and 17 Fletcher Cyc. Corp., for a discussion of the distinction between that which a corporation is created to do and that which it might have authority to do.

"In Hoffstater v. Jewell et al., 196 P. 194, 33 Idaho 439, the court denied plaintiff the right to foreclose a mortgage taken by a foreign corporation on domestic property on the ground that the foreign corporation had not complied with the statute concerning doing business in the state at the time it obtained the mortgage. The court noted that in dealing with the land in question the foreign corporation 'was doing that for which it was created, and in part at least that which it was especially organized to do.' See also Weiser Land Co. v. Bohrer et al., 152 P. 869, 78 Ore. 202.

"To revert to the fact situation at hand, it is seen that the foreign corporation concerned was organized to carry on the precise type of business which has brought it into the State of Ohio; that is, to acquire and lease motor transport terminals and incidental facilities. * * *"

It should also be pointed out that in Opinion No. 1078, Opinions of the Attorney General for 1918, cited above, the Attorney General in that opinion concluded that although the activities of the foreign bank there in question were not such as to make it subject to the franchise tax law, it was required to procure a license before doing business in this state. At page 420 of that opinion, the then Attorney General reasoned as follows:

"In my opinion the employment of an agent in this state with authority to receive payments on the part of the corporation would be enough to constitute the transaction of business, even

> though the agent was not authorized to represent the corporation to the extent of making the original contracts by which the obligations to make payments to the company would arise. A private corporation can of course transact business only through officers and agents. Wherever there is an agent authorized to represent the corporation in the transaction of any part of its business, there the corporation is; and the acts of the agent are the acts of the corporation. The making of collections on obligations due to the corporation is as essential a part of the business of the corporation as any other part of it which could be imagined. This proposition appears to me to be too clear to require citation of authority, though many are available."

Based upon these authorities I can only conclude that the purchase by a foreign association of real estate mortgage loans or unsecured property improvement loans is part of the normal business of a building and loan association, which must, of necessity, invest its funds. Thus, such activity is part of the function for which it was formed and constitutes the doing of business in Ohio, for which a certificate of authority from the Superintendent of Building and Loan Associations is required pursuant to Section 1151.64, Revised Code.

As to the making of a participation mortgage loan in conjunction with a domestic association, I can see no factors which would distinguish this from the direct making of a normal loan or from the purchase of a loan already made, especially since Amended House Bill No. 148, *supra,* makes no reference to the *making* of a participating loan as opposed to the *purchase* of participating interests in such loans already made by a domestic association. I conclude, therefore, that this, too, would be doing business in the state with the result that a foreign building and loan association, which wished to do business in Ohio by the methods mentioned above, must comply with the requirements of Section 1151.64, Revised Code, and Section 1155.13, Revised Code, for the procurement of certificates of authority to do business and the payment of annual fees.

As to the question of whether the failure to comply with such provisions would bar the use of Ohio courts to foreign associations attempting to enforce contractual agreements, the statutes are silent. It should be noted that Section 1155.17, Revised Code, provides a forfeiture by the corporation for such failure similar to that found in the foreign corporation law at Section 1703.28, Revised Code, but does not provide any criminal penalties similar to those in Section 1703.30, Revised Code, and does not

provide for prohibition of use of the courts similar to that in Section 1703.29, Revised Code.

While it is impossible, in the absence of any authority whatsoever, to conclude with any exactness on this subject, I am of the opinion that in the absence of a specific provision to the contrary, failure to comply with Sections 1151.64 and 1155.13, Revised Code, would not bar a non-complying foreign association from use of Ohio courts to enforce its obligations. Similarly, I can find no limitation on the length of time a security obtained by a foreign association through foreclosure or by deed may be retained by such association and, therefore, presume that there is no limitation.

Finally, I wish to note, parenthetically, that which I mentioned at the outset of this opinion, namely, that this opinion does not apply to federal savings and loan associations chartered pursuant to the Home Owners' Loan Act of 1933, as I do not believe such federally chartered institutions are amenable to the regulatory statutes of the State of Ohio.

It is, therefore, my opinion and you are accordingly advised that a foreign building and loan association which purchases from a domestic association real estate mortgage loans or unsecured property improvement loans made by the domestic association, or which makes participation mortgage loans in conjunction with a domestic association, is doing business in the State of Ohio so as to require it to comply with the certificate of authority and annual filing fee requirements of Sections 1151.64 and 1155.13, Revised Code, provided that the transaction is not merely a single, isolated act.

Respectfully,
MARK MCELROY
Attorney General