5406.

FRANCHISE TAX—FOREIGN CORPORATION—MERE CONTROL OF STOCK IN OHIO CORPORATION DOES NOT CONSTITUTE DOING BUSINESS IN OHIO—SPECIFIC CASE.

SYLLABUS:

Where a corporation is incorporated under the laws of another state and is organized solely for the purpose of conserving the interests of certain children as the members of a family in shares of stock in an Ohio corporation and a policy of life insurance assigned to such corporation by their father, which interests are evidenced by shares of stock of the foreign corporation which have been transferred to a bank in this state for the benefit of such children, and where the sole activities of the foreign corporation which is managed and controlled by the children of this family as stockholders, officers and directors thereof, consist in collecting the dividends on the shares of stock of the Ohio corporation owned and held by it and in applying the proceeds of such dividends to the payment of the premiums on said policy of life insurance and to the payment of the principal and interest on certain indebtedness of the father of these children which was assumed by the foreign corporation at the time it took from him the assignment of such shares of stock and policy of life insurance, the foreign corporation is not thereby doing business in this state or owning or employing its property and capital in this state in such manner as to make it amenable as a foreign corporation to the franchise taxes provided for by sections 5495, et seq., General Code.

COLUMBUS, OHIO, April 24, 1936.

The Tax Commission of Ohio, Columbus, Ohio. ....

GENTLEMEN: This is to acknowledge the receipt of a communication from your office in which my informal opinion is requested with respect to the liability, if any, of the H Corporation to make reports to the Tax Commission for franchise tax purposes or to pay franchise taxes in this state.

It appears from this communication, as well as from other information at hand, that The H Corporation is a corporation which was organized under the laws of the state of Delaware at Wilmington in said state in December, 1933, and that its incorporators were residents and citizens of that state. It appears further that the constitution and by-laws of the corporation fix the principal office of the company at Wilmington, Delaware, and that the corporation has designated a resident agent in charge

there. The annual meetings of the stockholders of the corporation have been held at Wilmington, Delaware, and the meetings of the board of directors have all been held in Ohio, six of such meetings having been held in the city of Cleveland and two in another Ohio city.

Among the charter powers of the corporation, it is authorized to purchase, hold and sell shares of stock or other securities of other corporations organized under the laws of the state of Delaware or elsewhere. Some time after its organization, this corporation, whose officers and directors are children of Mr. A., took over by way of assignment and transfer from Mr. A. 260,000 shares of the common stock of The X Company and life insurance policies in the amount of $690,000.00, in consideration of which The H Corporation issued to Mr. A. 18,000 shares of its own capital stock and assumed indebtedness of Mr. A. to certain banks in the cities of Cleveland and New York aggregating a substantial amount. Subsequently, Mr. A. assigned the 18,000 shares of stock of The H Corporation to a Cleveland bank as trustee of six separate irrevokable trusts for the benefit of his six children, the corpus of each trust being the 3,000 shares of The H Corporation stock assigned to the bank by Mr. A. for the purpose of such trusts.

Apparently, the only property now owned and held by The H Corporation is these 260,000 shares of the common stock of The X Company, which constitute about 11.5 percent of the total number of the issued and outstanding shares of the common stock of said company, and the policy or policies of insurance on the life of Mr. A. now held by it. And it appears that the only activities carried on by The H Corporation in this state have been the receipt by it from time to time of whatever dividends have been paid upon The X Company's stock owned and held by it, and the disbursement of such dividend moneys in the payment of interest on the indebtedness of Mr. A. assumed by it and in the payment of premiums on the life insurance policies which it holds.

With respect to the question whether, under the facts above stated, The H Corporation is required to file franchise tax reports with the Tax Commission and to pay franchise taxes in this state on its issued and outstanding shares of stock, it is noted that under the provisions of section 5495, General Code, the corporation franchise tax provided for by this and subsequent sections of the General Code is as to corporations organized for profit under the laws of any state or country other than Ohio, a tax "for the privilege of doing business in this state or owning or using a part or all of its capital or property in this state or for 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". It appears from your communication that this corporation has not received from the Secretary of State a certificate authorizing it to do

business in this state, and the only questions here presented are whether this corporation is doing business in this state or is owning or using a part or all of its capital or property in this state so as to require the payment by it of the corporation franchise taxes provided for by the sections of the General Code above referred to.

Under the purpose clause in the articles of incorporation of this corporation, it is authorized to carry on activities such that if the same are carried on in this state would constitute the doing of business in this state. As to this, it is to be observed, however, that a franchise tax of this kind is based not upon the charter powers of the corporation but upon its activities and, so far as this question is concerned, there is no incidence of the tax in this state unless its activities here are such as to constitute doing business within the meaning of that term as the same is used in the statutory provisions providing for the tax. Von Baumbach v. Sargent Land Company, 242 U. S., 503; Rose v. Nunnally Investment Company, 22 Fed. (2d), 102, 103. In this connection, it seems obvious that if this corporation is doing business any place, it is carrying on the same in this state, since it does not appear that it is carrying on any corporate activities in the state of its incorporation or in any State other than Ohio. This, however, is in no way conclusive with respect to the question at hand. Addressing itself to a question of this kind, the Court of Appeals of New York in the case of People, ex rel., v. Knapp, 229 N. Y., 502, said:

> "A contention that the relator must be doing business in New York because it was not doing business elsewhere, cannot be sustained. A corporation is no more bound to pursue the activities of business than is the private citizen. It may, as may he, enter into and then retire from business or refrain from business. Nor is every exercise of its chartered powers and purposes the doing of business within the purview of the Tax Law."

The immediate question here presented is whether the activities of The H Corporation above stated constitute doing business in this state. In this connection, it is pertinent to note that the Court of Appeals in the case of People, ex rel., v. Knapp, supra, in its opinion in the decision of this case, said:

> "The condition of doing business in this state, within that intendment, implies that the foreign corporation is accomplishing acts and activities within the state which the state might reasonably and with ordinary interstate comity interdict or prevent and

the doing of which was a privilege which required governmental consent, supervision and control and which necessitated or sought governmental opportunity and protection to be compensated or balanced by contributions through taxation to the burden of government."

Hovey v. DeLong Hook & Eye Co., 211 N. Y., 420; Penn Collieries Co. v. McKeever, 183 N. Y., 98; People, ex rel. Lehigh & New York Railroad Co. v. Sohmer, 217 N. Y., 443; Von Baumbach v. Sargent Land Co., supra. And touching this question, it may be noted that the authorities generally support the proposition that a corporation is not "doing business" if it is not engaged in gainful operations even though in a limited way it is carrying on some activities coming within the purpose for which it was organized. Lane Timber Co. v. Hynson, (C. C. A. 5th), 4 Fed. (2d), 666; United States v. Hotchkiss Redwood Co., (C. C. A. 9th), 25 Fed. (2d), 958; Fink Coal and Coke Co. v. Heiner, (D.C.), 26 Fed. (2d), 136; Emery, B. T. Realty Co. v. United States, (D.C.), 198 Fed., 242, 237 U. S., 28; State Line and S. R. Co. v. Davis, (D.C.), 228 Fed., 246; Argonaught Consolidated Mining Co. v. Anderson, (D.C.), 42 Fed. (2d), 219; Rose v. Nunnally Investment Company, (C. C. A. 5th), 22 Fed. (2d), 102, 276 U. S., 628; Zonne v. Minneapolis Syndicate, 220 U. S., 187; People, ex rel., v. Knapp, supra. And as an application of this rule, it is further held that the mere ownership by a foreign corporation of the stock of other corporations and the collection and disbursement of dividends on such stock do not constitute doing business within the state. People's Tobacco Company v. American Tobacco Co., 246 U. S., 79; Cannon Mfg. Co. v. Cudahy Baking Co., 267 U. S., 333; Toledo Traction Light and Power Company v. Smith, (D.C.), 205 Fed., 643; Mannington v. Hocking Valley Railway Co., (C.C.), 183 Fed., 133; Automotive Material Company v. American Standard Metal Products Co., 327 Ill., 367; People v. American Bell Telephone Co., 117 N. Y., 241; Callery's Appeal, 272 Penn., 255. In the case of Toledo Traction Light and Power Co. v. Smith, supra, it was held that the fact that a foreign corporation which owns stock in an Ohio corporation acted as a stockholder and as such gave assent to changes in the regulations of the Ohio corporation, was not thereby "doing business" or "tarnsacting business" in Ohio, within the meaning of sections 178 and 5508 of the General Code of Ohio, requiring a foreign corporation doing business or transacting business in this state to procure a certificate from the Secretary of State, and declaring contracts entered into by such corporation without complying with this requirement void. It was so held by the court for the reason that the statutes referred to in the court's opinion, and above mentioned, dealt only with transactions which are a part of the regular

business of a foreign corporation, in this state, and for the reason that these statutes do not affect casual or incidental corporate acts of the foreign corporation. And in the case of Mannington v. Hocking Valley Railway Co., supra, it was stated that the mere ownership of stock by a foreign corporation in a domestic corporation, even if it be a controlling interest, did not constitute a transaction of business in this state.

Among the many cases that might be cited on the question as to whether or not the ownership by a foreign corporation of stock in other corporations and the collection and disbursement of moneys paid as dividends on such stock constitute "doing business", the case which in many of its essential features most closely corresponds with those here presented with respect to The H Corporation, is the case of Rose v. Nunnally Investment Company, supra. In that case, which was decided by the Circuit Court of Appeals of the Fifth Circuit and in which the court construed a section of the Revenue Acts of 1918 and 1921 (Comp. St., sec. 5980n) which imposed upon corporations a capital stock tax "with respect to carrying on or doing business", the court held that a corporation which was not engaged in any active business, but with is capital largely invested in stocks and bonds, and its stock all owned by four members of the same family, was not "doing business" so as to subject it to the capital stock tax provided for in said acts, because of loans to its stockholders, or because of a few loans of small amounts to others not made for profit. In this case it appeared that the company was originally incorporated, pursuant to the laws of the state of Georgia, under the name of the Nunnally Company, and thereafter engaged in the manufacture and sale of candy until the year 1920, when it sold its business to a company of the same name, but which was incorporated under the laws of Delaware, and thereafter secured an amendment to its own charter, changing its name to Nunnally Investment Company, and limiting its charter powers but leaving it still authorized to own, buy, and sell stocks and bonds, evidences of indebtedness, and other personal property. The proceeds of the sale to the Delaware corporation constituted the entire assets of the Nunnally Investment Company. A part of the consideration of that sale, received by the Nunnally Investment Company, was represented by about forty percent of the capital stock of the purchasing company. The Nunnally Investment Company during the time there in question had but four stockholders, the same being J. H. Nunnally, his wife, son and daughter, who held the annual meetings of the stockholders and elected the officers. Meetings of the board of directors were held semi-annually, at which meetings semi-annual dividends in the amount of $50,000.00 were declared. There were no regular employes and salaries were paid only to the president and vice-president of the company. At the beginning of the period for which the taxes there in question were levied,

the capital and surplus of the company amounted to $2,493,748.00 and consisted wholly of personal property, to-wit, cash, loans to stockholders of the company, loans to employes of the Nunnally Company, stock in the Nunnally Company, industrial, municipal and foreign bonds. The activities of the company consisted in the collection of the dividends and other income on the stocks, loans and bonds above referred to, the disbursement of such income as dividends and the making of the loans above referred to.

The court in this case, after citing a number of cases construing the Corporation Tax Law of 1909 with respect to the provisions therein laying a tax upon corporations doing business, including the cases of Von Baumbach v. Sargent Land Company, supra; McCoach v. Minehill, etc., Railway Co., 228 U. S., 295; and United States v. Emery, etc., Co., 237 U. S., 28, said:

> "Upon the authority of these cases it may safely be stated that the tax is based, not upon the charter powers of the corporation, but upon its activities, and that a corporation which merely receives the income earned by assets which it owns, and distributes that income among stockholders, is not engaged in business. In the Von Baumbach Case, supra, the earlier cases are reviewed, and the rule for determining whether or not a corporation is engaged in business is stated in the following language:
>
> 'It is evident, from what this court has said in dealing with the former cases, that the decision in each instance must depend upon the particular facts before the court. The fair test to be derived from a consideration of all of them is between a corporation which has reduced its activities to the owning and holding of property and the distribution of its avails, and doing only the acts necessary to continue that status, and one which is still active, and is maintaining its organization for the purpose of continued efforts in the pursuit of profit and gain and such activities as are essential to those purposes.'"

As in the case of the Nunnally Investment Company, the affairs of which were under consideration in the case of Rose v. Nunnally Investment Company, supra, the activities of The H Corporation consist solely in owning and holding certain kinds of intangible property and the distribution of the avails or income thereof. Likewise, in this case, as in the case above cited, the primary purpose of the corporation is to conserve the property interests of a family for the ultimate benefit of the children of such family; and in this case, as before noted, the present activity of the corporation is the collection of dividends on The X Com-

pany stock held by it and the disbursement of the same in the payment of premiums on the insurance policy held by this corporation and in the payment of the principal and interest on the indebtedness of Mr. A which the corporation assumed in taking over his stock, which stock is represented by certificates, all of which, with the exception of one certificate representing twelve thousand shares of The X Company stock, which is held by a Cleveland bank, are held by banks in other states as security for such indebtedness. Again, in this case, as in the Nunnally case, the stockholders, directors and officers of the corporation are members of the family whose interests are conserved by the corporation, in this case the stockholders, directors and officers of the corporation all being children of Mr. A.

Upon the considerations above noted and discussed, I am of the opinion that The H Corporation is not "doing business" in this state as this term is used in sections 5495, et seq., General Code, and that so far as the exaction of a franchise tax upon a foreign corporation is conditioned upon the fact that such corporation is doing business in this state, no such taxes can be imposed upon the corporation here in question.

However, the imposition of corporation franchise taxes by the provisions of sections 5495, et seq., General Code, are not as to foreign corporations conditioned alone upon the fact that such corporations are doing business in this state but such taxes are likewise imposed upon foreign corporations for the privilege of owning or using a part or all of their capital or property in this state. As before noted, the only property that is owned by The H Corporation consists of the shares of stock of The X Company which were transferred to it by Mr. A., and the dividends thereon which are paid to the corporation from time to time. Inasmuch as The H Corporation is not a domestic corporation but is a corporation incorporated and organized under the laws of the state of Delaware and since the shares of stock of The X Company which it owns are intangible property, the situs of such shares of stock for purposes of taxation is in the state of Delaware rather than in this state unless such shares of stock have been localized for taxation in this state. See In re Pantlind Hotel Company, 232 Mich., 330; Gallery's Appeal, 272 Pa., 255; Commonwealth v. Sunbury Converting Works, 286 Pa., 545. In the consideration of the question whether the shares of stock owned by The H Corporation have been localized in this state for purposes of taxation, the following provisions in section 5498, General Code, are noted:

> "In determining the amount or value of intangible property, including capital investments, owned or used in this state by either a domestic or foreign corporation the commission shall

be guided by the provisions of section 5328-1 and 5328-2 of the General Code except that investments in the capital stock of subsidiary corporations at least fifty-one per centum of whose common stock is owned by the reporting corporation shall be allocated in and out of the state in accordance with the value of physical property in and out of the state representing such investments."

Since it does not appear that The X Company is a subsidiary of The H Corporation, or that the latter corporation owns and holds fifty-one percent of the common stock of The X Company, the location of the physical property of the last named corporation does not determine the situs for purposes of taxation of the stock of this company owned by The H Corporation. The situs of the shares of stock of The X Company owned and held by The H Corporation must be determined, therefore, by consideration of the provisions of sections 5328-1 and 5328-2, General Code, above noted. These sections of the General Code were enacted in and as a part of the Intangible and Personal Property Tax law passed in 1931. Section 5328-1, General Code, provides generally for the taxation of intangible property of persons residing in this state and further provides that "property of the kinds and classes mentioned in section 5328-2 of the general code, used in and arising out of business transacted in this state by, for or on behalf of a non-resident person, other than a foreign insurance company as defined in section 5414-8 of the general code, and non-withdrawable shares of stock of financial institutions and dealers in intangibles located in this state shall be subject to taxation". By section 5328-2, General Code, it is provided:

"Property of the kinds and classes herein mentioned, when used in business, shall be considered to arise out of business transacted in a state other than that in which the owner thereof resides in the cases and under the circumstances following:

* * * * * * * * *

In the case of investments not held in trust, when made, created or acquired in the course of repeated transactions of the same kind, conducted from an office of the owner in such other state, and (1) representing obligations of persons residing in such other state or secured by property located therein, or (2) when an officer or agent of the owner at the owner's office in such other state, has authority, in the course of the owner's business, to receive or collect the income thereon or the principal, if any, or both when due, or to sell and dispose of the same."

The shares of stock of the X Company owned and held by the H Corporation have the character of "investments" within the purview of sections 5328-1 and 5328-2, General Code, both for the purpose of property taxation under these sections, and for the purpose of corporation franchise taxes under the provisions of sections 5495, et seq., General Code. It is seen by the provisions of section 5328-2, General Code, which section is made applicable in the determination of the situs of intangible property for corporation franchise tax purposes, that property of the kind here in question owned by a foreign corporation can obtain a situs in this state for tax purposes when such property has been created or acquired in the course of repeated transactions of the same kind conducted from an office of the foreign corporation in this state. This provision, found in section 5328-2, General Code, is, perhaps, a concession to the general view expressed in the case of Bristol v. Washington County, 177 U. S., 133, and other cases that might be cited, that investments owned by a non-resident of the state may be localized for taxation in such state under the laws thereof, when such investments are acquired by a resident agent who is authorized to invest and reinvest the moneys of his principal, and who actually carries on business in this manner at an office used for the purpose in such state. It does not appear from the facts submitted to me in connection with the questions preseinted in your communication that the shares of stock above referred to were acquired by the H Corporation in the course of repeated transactions as this term is used in section 5328-2, General Code. These shares of stock were acquired by this corporation in two successive transactions in and by one of which the corporation acquired two hundred thousand shares of stock from Mr. A. and in the other sixty thousand shares which are owned and held by the corporation in the manner and for the purposes above stated. In other words, there is not present in this case an investment or reinvestment of funds and the acquisition thereby of intangible property of the kind here in question, such as is contemplated by this statute as a condition for the localization of the property for taxation in this state when the same is owned by a non-resident, whether such non-resident be an individual or a corporation organized under the laws of some other state.

Tested by the provisions of sections 5328-1 and 5328-2, General Code, which control the question of the allocation of the property of The H. Corporation for purposes of franchise taxes to the exclusion of other and more general provisions of law which might otherwise apply in this situation, it does not appear that this property has a situs for purposes of taxation in this state. And upon all the considerations above noted and discussed, I am of the opinion, upon the facts here presented, that The H. Corporation is not doing business in this state or owning or employing its property and capital in this state in such manner as to make it

amenable to franchise taxes under the provisions of sections 5495, et seq., General Code.

Respectfully,
JOHN W. BRICKER,
Attorney General.

5407.

TUITION—BOARD OF EDUCATION REQUIRED TO PAY TUITION OF PUPILS ATTENDING SCHOOL IN ANOTHER DISTRICT IN SAME TOWNSHIP.

SYLLABUS:

1. School districts are separate and independent subdivisions of the state, established for school purposes.

2. The fact that two school districts are located in the same civil township does not exempt the board of education of either district from the payment of tuition to the board of education of the other district in a proper case as provided for by former Section 7747, General Code, or Sections 7748 or 7595-1d, General Code.

COLUMBUS, OHIO, April 24, 1936.

HON. CLIFTON L. CARYL, *Prosecuting Attorney, Marysville, Ohio.*

DEAR SIR: This will acknowledge receipt of your request for my opinion, which reads as follows:

> "In Liberty Township, Union County, there is a special school district known as Peoria Special, at which place a grade school is maintained. During the past number of years the high school students have all attended a high school located at Raymond, Ohio, in the same township. During the past years the school at Peoria has paid tuition for students who attended school at Raymond, and in the past year the Peoria Special School District has denied and refused to pay tuition for their pupils who attend the Raymond high school. There is no written contract or verbal contract with respect to payment of tuition for pupils who attend high school at Raymond.
>
> We would like your interpretation as to whether or not the Board of Education of Peoria Special School District would be obligated to pay tuition for pupils attending the Raymond school which is in the same township."