

1390.

APPROVAL, BONDS OF LIBERTY TOWNSHIP RURAL SCHOOL DISTRICT, TRUMBULL COUNTY—\$35,000.00.

COLUMBUS, OHIO, January 13, 1930.

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

1391.

TAX AND TAXATION—FOREIGN CORPORATION TRANSACTING BUSINESS IN OHIO—STOCK IN FOREIGN CORPORATION AND BANK DEPOSITS OUTSIDE OHIO, POSSESSED BY SUCH CORPORATION NOT TAXABLE.

SYLLABUS:

Shares of stock in a New Jersey corporation and bank deposits in the state of New York owned by a corporation organized under the laws of the state of Delaware, and transacting its business in Ohio, are not taxable under the laws of this state, where it does not appear that such property is employed by such corporation in carrying on its business in this state or is otherwise used by it in commercial transactions in this state.

COLUMBUS, OHIO, January 13, 1930.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN :—This is to acknowledge receipt of a communication from you with which you enclose a communication received by you from Hon. John A. Zangerle, County Auditor of Cuyahoga County, Ohio. Mr. Zangerle, in his communication to you, requests my opinion upon the question whether certain property owned by the Brunswick Company, a corporation organized under the laws of the State of Delaware, is taxable in this state. The communication from the county auditor above referred to reads as follows:

“This department would like to have an opinion from the Attorney General of the State of Ohio on the following question: The Brunswick Company transacts all of its business in Cleveland. Its principal accounting office is in Cleveland, and all of its executive meetings are held in Cleveland. It owns 2,000 shares of The Standard Oil Company of New Jersey (foreign corporation) and also has on deposit \$100,000 in The Chase National Bank in New York. *Is this stock and money taxable at Wilmington, Delaware, the domicile of The Brunswick Company, or at the principal office designated in Ohio, which is Cleveland?*”

The Legislature of this state, pursuant to the mandate contained in Section 2 of Article XII of the state constitution, has made provision for the taxation of the property both of individuals and of corporations. Section 5328, General Code, which is general in its provisions, reads as follows:

"All real or personal property in this state, belonging to individuals or corporations, and all moneys, credits, investments in bonds, stocks, or otherwise, of persons residing in this state, shall be subject to taxation, except only such property as may be expressly exempted therefrom. Such property, moneys, credits, and investments shall be entered on the list of taxable property as prescribed in this title."

Section 5404, General Code, which applies with respect to the taxation of property of corporations, reads as follows:

"The president, secretary, and principal accounting officer of every incorporated company, except banking or other corporations whose taxation is specifically provided for, for whatever purpose they may have been created, whether incorporated by a law of this state or not, shall list for taxation, verified by the oath of the person so listing, all the personal property thereof, and all real estate necessary to the daily operations of the company, moneys and credits of such company or corporation within the state, at the true value in money."

Addressing itself generally to the system of property taxation in this state, the Supreme Court, in the case of *Worthington vs. Sebastian*, 25 O. S. 1, 8, in its opinion, said:

"Our systems of ad valorem taxation has uniformly proceeded upon the theory, that tangible property is to be taxed according to the law where it is situated, irrespective of the residence of its owner; while, with equal uniformity, it has proceeded upon the theory that credits, investments in bonds, stocks, etc., are taxable according to the laws of the place where their owners or holders reside."

In the case of *Myers vs. Seaberger*, 45 O. S. 232, 235, the Supreme Court, speaking of the statutory provisions now contained in Section 5328, General Code, said:

"The first clause embraces all tangible property, real or personal, situated in this state, irrespective of the residence of the owner; and the second clause embraces all intangible property of persons residing in this state, irrespective of where the subject of the property may be situated."

Likewise, the Supreme Court, in the case of *Coal Co. vs. O'Brien*, 98 O. S. 14, 17, referring to Section 5328, General Code, said that "under the provisions of this section all real and personal property in this state belonging to individuals and corporations is subject to taxation, as are all moneys, credits, investments in bonds, stocks, or otherwise, of persons *residing* in this state."

Both of the different kinds of property involved in the question presented by the communication of the county auditor above referred to are what are known as intangible property. That this is the character of the shares of stock referred to in said communication is fully determined by the opinion of the Supreme Court of the State in the case of *Cassidy, et al. vs. Ellerhorst*, 110 O. S. 535, 544, 545. That money on deposit in a bank in another state is intangible property with respect to the application of the taxing laws of this state has been decided by the Supreme Court in the case of *Coal Co. vs. O'Brien, supra*. It is quite clear, therefore, that if the property here in question were owned by an individual or corporation residing and domiciled in Ohio, said property would be taxable under the laws of this state. *Worthington vs.*

Sebastian, supra; Bradley vs. Bauder, 36 O. S. 28; *Lee vs. Sturges*, 46 O. S. 153; *Coal Co. vs. O'Brien, supra*.

However, the corporation owning the property involved in the present inquiry was incorporated under the laws of the State of Delaware. This corporation does not, therefore, reside in the State of Ohio; and the fact that it has been admitted to do business in Ohio does not make it a resident of this state. *Lander, Treas., vs. Burke*, 65 O. S. 532. It follows from a consideration of the above that the property here in question cannot be taxed as moneys, credits or investments in stocks of a "person residing in this state" within the meaning of this term as used in Section 5328, General Code.

It remains to be determined whether the property here in question is personal property in this state within the meaning and application of the pertinent provisions of Sections 5328 and 5404, General Code, above quoted. Touching this question, it is noted that in an opinion of this office directed to you under date of August 23, 1918 (Opinions of Attorney General, 1918, Vol. II, p. 1140), it is said:

"Intangible property cannot with any accuracy be said to be 'situated' anywhere; that is to say, in the nature of things it can not have any independent situs. Hence, at common law, and in the absence of statute incorporeal property was assigned location wherever its location was necessary by applying the maxim *mobilia sequuntur personam*. It is now established, however, that it is within the power of a state to deal with intangible property on the footing of situs, as Mr. Justice Holmes puts it in *Wheeler vs. Sohmer*, 233 U. S., 434-439—that is, to assign to intangible property an artificial location dependent upon some such factor as the place where the tangible evidence of the property may be kept, the place where the business is conducted which originates the intangible property, etc., and in so doing to reject the principle *mobilia sequuntur personam*.

Legislation directed to this end would, of course, most appropriately take the form of an express declaration that for a given purpose—in this instance property taxation—the intangible property in question should be deemed to be situated or located at some such place. But it is well established that statutory expressions containing no direct mention of the subject of situs or location may be construed and applied as intended to accomplish this end."

Conformable to the principles of laws relating to the taxation of intangible personal property noted in the former opinion of this office above referred to, it has been held that the statutory provisions now contained in Section 5404, General Code, effectively provided for the taxation in Ohio of credits such as book accounts, promissory notes and the like held by a foreign corporation in this state and arising out of business done by it in this state. *Hubbard vs. Brush*, 61 O. S. 252.

Likewise, on the same principle, it has been held that bonds owned by a foreign corporation and deposited in this state pursuant to statutory requirement as a condition to its right to do business here are property subject to taxation under the authority of the provisions of Sections 5328 and 5404, General Code. *Scottish Union and National Insurance Co. vs. Bowland*, 196 U. S. 611.

However, consistent with the due process of law clause and provision of the Federal Constitution, the provisions of Sections 5328 and 5404, General Code, may not be construed so as to authorize the exercise of the taxing power that is not referable in some way to property, persons or business within this state, and subject to its jurisdiction. State Tax on foreign held bonds, 15 Wall. 300; *Tappan vs. Merchants National Bank*, 19 Wall. 490; *Union Refrigerator Transit Company vs. Kentucky*, 199 U. S. 194; *Commonwealth vs. Union Pacific Railway Company*, 214 Ky. 339; *Great Southern Life Insurance Company vs. City of Austin*, 112 Tex. 1.

In apparent recognition of this principle, the Supreme Court of this state in the case of *Cassidy vs. Ellerhorst, supra*, held that shares of stock in a foreign corporation and municipal bonds issued in a state other than Ohio owned by a resident of the state of Kentucky, but kept by him in a bank in the city of Cincinnati, Ohio, were not taxable in this state, although it appeared that the owner of said property in his life time conducted his business in this state. In the case of *Tax Commission of Ohio vs. The Farmers Loan and Trust Co.*, 119 O. S. 410, it was held that bonds of Ohio municipalities held by a person not a resident of this state at the time of his death, and which descend or are bequeathed to a person not a resident of Ohio, are not "within the state" within the meaning of Sections 5331 and 5332 of the General Code, and therefore not subject to the inheritance tax laws of this state. Both of the cases just cited related to inheritance taxes under Ohio inheritance tax laws, but obviously the fundamental principle involved is no different in application to property taxes.

It is noted, however, that the decision of the court in the case of *Cassidy vs. Ellerhorst, supra*, is predicated upon the assumption that the securities there in question were not employed in commercial transactions within this state at the time of the death of the person owning such property.

Giving effect to the principles above noted to the particular questions submitted in the communication of the county auditor, you are advised that the property here in question may be subjected to taxation by the State of Delaware, though no part of the business of the Brunswick Company is transacted in that state. *Cream of Wheat Co. vs. County of Grand Forks*, 253 U. S. 325. Further upon the considerations above noted, and assuming that the securities and bank deposit referred to in said communication are not employed in the conduct of the company's business in this state or otherwise used by it in commercial transactions here, I am of the opinion that said property is not subject to taxation in this state.

It is not stated in the communication of the county auditor where the certificate of the shares of stock or the certificate of deposit or other evidence of the money deposited in bank, is held; but inasmuch as these things are but evidences of the property involved to a consideration of the questions presented, it is immaterial where the evidences of such property are held. *Cassidy vs. Ellerhorst, supra*.

Respectfully,

GILBERT BETTMAN,
Attorney General.

1392.

CRIMINAL LAW—WHEN INFORMATION TO BE FILED IN PROBATE COURT BY PROSECUTING ATTORNEY—EXCEPTIONS.

SYLLABUS:

Where a prosecuting attorney elects to prosecute a case in the Probate Court, which has been returned to the Common Pleas Court by a justice of the peace or other officer, he must file an information by virtue of the provisions of Section 13425-1 of the General Code, except in cases where the statutes authorize the filing of an affidavit.

COLUMBUS, OHIO, January 13, 1930.

HON. C. G. L. YEARICK, *Prosecuting Attorney, Newark, Ohio.*

DEAR SIR:—I am in receipt of your letter of recent date in which you make the following inquiry: