

the number of the instrument and the name of the grantor, are as follows:

Number	Name
460	George W. Arnett
461	Neff Bros.
462	Ezra Snider
463	Ezra Snider

By the above grants there is conveyed to the State of Ohio, certain lands described therein, for the sole purpose of using said lands for public fishing grounds, and to that end to improve the waters or water courses passing through and over said lands.

Upon examination of the above instruments, I find that the same have been executed and acknowledged by the respective grantors in the manner provided by law and am accordingly approving the same as to legality and form, as is evidenced by my approval endorsed thereon, all of which are herewith returned.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

152.

SALES—OHIO MANUFACTURED PRODUCTS—SALES WITHIN AND OUTSIDE OHIO—OHIO BUSINESS FOR FRANCHISE TAX PURPOSES.

SYLLABUS:

Sales made of products manufactured in Ohio, from the company's factories located in this state to customers within and outside of Ohio are to be considered Ohio business, for the purpose of determining the franchise tax to be assessed under the laws of this state.

COLUMBUS, OHIO, February 19, 1937.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN: I received your letter of recent date which reads as follows:

"The Tax Commission requests your opinion relative to the

taxation for franchise tax purposes, of The American Sheet and Tin Plate Company, a foreign corporation doing business in Ohio.

Said company maintains factories in Ohio and Pennsylvania and in its reports to the Commission, reports sales made from its Ohio factories to customers within Ohio, and sales made from its Ohio factories to customers outside of Ohio as extra-state business, and in support of its claim, said company contends that by reason of having its place of business in Pittsburgh, Pennsylvania, all sales are made outside of Ohio and, therefore, such sales constitute business done outside of Ohio.

The Commission contends that all sales made from the Ohio factories of a foreign corporation having its principal place of business in another state constitutes 'doing business' in Ohio, regardless of where the products of such factory are sold or transported.

For your further information, the Commission in support of its contention, bases its determination upon the following Opinions of the Attorney General: A. G. O. No. 246, page 460, April 15, 1915; A. G. O. No. 1096, July 24, 1933 and A. G. O. No. 4225, April 27, 1932.

The Commission requests your formal opinion at your earliest convenience, in view of the fact that a considerable amount is involved which accrues to the general revenue fund of the state."

The questions presented in your letter are whether the sales made from the company's factories located in Ohio to customers within Ohio and outside of Ohio are to be considered Ohio business for the purpose of determining the franchise tax to be assessed under the laws of this state.

A foreign corporation is required to pay an annual franchise tax for the privilege 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 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 tax is payable. Section 5495, General Code.

The tax is levied 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 commencement of the current annual accounting period of such corporation. Section 5498, General Code. In determining that part of the

value of the issue and outstanding shares of stock of the corporation represented by property owned or used and business done by the corporation in this state, two separate fractions are used, a property fraction and a business fraction. Since your letter refers only to the sales of the company, the question relates to the business fraction used in determining the part of the value of the issued and outstanding shares of stock to which the rate prescribed in Section 5499, General Code, is applied. The value of the business done by the corporation in this state is represented in the numerator of the business fraction, whereas the total value of the business of the corporation wherever transacted is represented in the denominator of the business fraction. The purpose is to arrive at the relative volume of Ohio business as compared with the volume of business wherever transacted.

A foreign corporation can do business in this state only on such terms and conditions, subject to federal constitutional limitations, as the state may impose and therefore a franchise tax may be imposed upon a foreign corporation for the privilege of doing business in this state. *Southern Gum Co. vs. Laylin*, 66 O. S. 578. The authority of the legislature to impose an excise or franchise tax upon foreign corporations for the privilege of doing business in Ohio is no longer debatable, the only limitation being that the tax must be reasonable and uniform upon all corporations of a class throughout the state. *State, ex rel. Northwestern Mutual Life Insurance Co. vs. Tomlinson*, 99 O. S. 233.

There can be no question that the corporation being engaged in the manufacturing business in Ohio is doing business within the meaning of Ohio statutes and it therefore becomes necessary to determine the basis of computing the tax.

The real point at issue seems to be the manner of determining the value of the business of the company in this state so that the proper "Ohio business" may be represented in the numerator of the business fraction. Under the statute, the measure of business transacted within the state is the value of the business done within this state.

It is well established by opinions of this office that the sales of a foreign corporation of products manufactured in Ohio to customers within and without this state are the value of business done by the corporation in Ohio. In Opinions of the Attorney General for 1915, Vol. 1, page 460, it was held in the third branch of the syllabus:

"The operation of a factory in Ohio by a foreign corporation having its principal place of business in another state constitutes 'doing business' in Ohio, regardless of where the products of such factory are sold or transported; and it is reasonable

and lawful under section 5502 to measure the volume of such business by sales of manufactured articles, whether such sales otherwise represent interstate commerce or not."

The Attorney General in his opinion points out that the word "business" as used in Section 5502, General Code, is synonymous with the same word as used in Section 5499, General Code.

Again, in Opinions of the Attorney General for 1932, Vol. II, page 615, at page 620, the then Attorney General said the following:

"* * * it would appear that all of the business of a foreign corporation arising from the manufacturing plant located in Ohio should be considered as Ohio business, regardless of whether such manufactured articles were sold and delivered without the state, but when products of such corporation manufactured outside of Ohio are delivered not from warehouses in Ohio but directly from the factory or warehouse without the State of Ohio, upon receipt of orders solicited in Ohio but accepted and filled at the plant outside of the state, such business is not Ohio business but interstate business and should be so considered for the purpose of determining the franchise tax against such foreign corporation."

Your attention is directed to the case of *Western Cartridge Co. vs. Emerson*, 281 U. S. 511. The headnotes of this case read as follows:

"A state franchise tax or license fee imposed on a manufacturing corporation at the rate of five cents per hundred shares of that portion of its issued capital stock which bore the same ratio to all its issued capital stock as the amount of its property and business within this state bore to its total business and property, *held* not violative of the commerce clause although much of the business included in the computation as transacted in the state consisted of sales of goods upon orders received from outside and accepted by mail, the goods being shipped by the corporation f.o.b. at its factories to destinations designated by the purchasers."

By reason of the above opinions and decisions, it would seem reasonable and lawful to measure the volume of business done by the company in this state by the sales of its manufactured products.

Counsel for the company submitted a brief in connection with the subject matter of your letter. It is their contention that sales are rep-

representative of the combination of several activities and not of any one activity standing alone. Therefore, it is suggested that there be eliminated from the numerator of the business fraction the value of the missing functions as otherwise reflected in the sales price; that is, if any activity is absent from the Ohio business but is exercised in some other state, then the figures representing sales should be reduced by the amount representing the missing activity. In other words, if raw material is procured outside of Ohio for use of Ohio factories in the manufacture of these materials into finished products of the Ohio factories, such raw material should be excluded from that part of the numerator representing the business done by the corporation within Ohio.

I am of the opinion that there is some merit to the argument presented by counsel for the company and it may be that sales do not in all cases constitute an accurate measure of the volume or extent of a manufacturing business; yet, it seems that the most practical method of arriving at any definite conclusion with any degree of uniformity is to measure the value of business done in Ohio by actual sales. It is perhaps possible to work out a better method of arriving at the fair value of the corporation's business; yet, knowing that the Commission has used sales as the measure of the value of business in this state for many years, I hesitate to advise any other method for the present. Practical objections present themselves to any other method, the most important of which is that any other method may not apply with any degree of uniformity to all corporations required to pay the tax. Above everything else, uniformity of apportionment is to be sought within the limits of the law. I believe the Commission would be justified in following the practical method rather than any other method against which technical objections may be made, for the Commission has some discretion in adopting methods of arriving at and measuring the relative volume of business in Ohio. The Attorney General in *Opinions of the Attorney General for 1915*, Vol. III, page 2411, goes to great length in discussing a rule for determining the relative volume of business of a foreign manufacturing corporation when it operates factories in Ohio and also sells products of outside factories in Ohio.

This opinion recognizes the inaccuracy of measuring the value of Ohio business by sales and suggests two other methods, together with formulas to determine the Ohio business of a foreign manufacturing company. Deductions of certain activities are made from sales in order to more accurately reflect the extent of the corporate activity within the state. This opinion, however, concedes that there are practical objections to both methods suggested and although it contends that the Commission is the judge as to whether one method or the other is the more accurate, it nevertheless advises the Commission to adopt the one method

which is the less objectionable and then only for the current year. I am informed by the Commission that the method suggested by the Attorney General of Ohio in 1915 as analyzed in the opinion above referred to, is impractical and will not operate with any degree of uniformity. Consequently, the Commission continued to use actual sales as the measure of the value of business.

It may be that as to some companies it is quite possible to determine the value of business by a more scientific formula than the one used by your commission. However, I am of the opinion that such a scientific formula would be improper if it could not be applied to all companies, for, as pointed out, above everything else, uniformity of apportionment should be sought.

After all, it is not the sales of the company that are subject to taxation. They are used merely for the purpose of apportioning a tax upon a privilege. Taxes levied by taxing authorities have been held valid, even though sales of the company in interstate commerce have been used as one of the elements for determining the amount of a tax. The Supreme Court of the United States in the case of *Hump Hairpin Mfg. Co. vs. Emerson*, 258 U. S. 290, at page 294, said the following:

“While a state may not use its taxing power to regulate or burden interstate commerce, on the other hand it is settled that a state excise tax which affects such commerce not directly but only incidentally and remotely, may be entirely valid where it is clear that it is not imposed with the covert purpose or with the effect of defeating federal constitutional rights. As coming within this latter description taxes have been so repeatedly sustained where the proceeds of interstate commerce have been used as one of the elements in the process of determining the amount of a fund (not wholly derived from such commerce) to be assessed, that the principle of the cases so held must be regarded as a settled exception to the general rule. The turning point of these decisions is, whether in its incidence the tax affects interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of, or restraint upon it, or whether it affects it only incidentally or remotely so that the tax is not in reality a burden, although in form it may touch and in fact distantly affect it.”

Specifically answering your question, I am of the opinion that sales made of products manufactured in Ohio from the company's factories located in this state to customers within and outside of Ohio are to be

considered Ohio business for the purpose of determining the franchise tax to be assessed under the laws of this state.

Respectfully.

HERBERT S. DUFFY,
Attorney General.

153.

TOWNSHIP TRUSTEES—CONTRACT WITH VILLAGE COUNCIL—USE OF VILLAGE FIRE EQUIPMENT—TRUSTEES CANNOT PURCHASE AND MAINTAIN FIRE EQUIPMENT WHEN.

SYLLABUS:

1. *Township trustees may not purchase and maintain fire equipment for a village volunteer fire company even though such equipment is to be used outside of the village, and within the township.*

2. *Under Section 3298-60, General Code, a board of township trustees may contract with a village council for the use of a fire department and apparatus owned by it.*

COLUMBUS, OHIO, February 19, 1937.

HON. ALEXANDER HYZER, *Prosecuting Attorney, Fremont, Ohio.*

DEAR SIR: I acknowledge receipt of your communication of recent date which reads as follows:

“The Village of Woodville is an incorporated village located approximately in the center of the Township of Woodville, Sandusky County, Ohio. It is the desire of the Township Trustees to furnish fire protection for persons living in said township outside the limits of Woodville Village.

The Village of Woodville now maintains equipment for the use of the Volunteer Fire Department and said Volunteer Fire Department seems to be of such long standing as to have the assurance of permanency.

Question No. 1—Is the Volunteer Fire Company of the Village of Woodville a sufficient organization to comply with Section 3298-54, General Code, so as to permit Woodville