

and it is not within the province of this department to say, as a matter of law, that positions so designated do or do not fall within those classifications. This is left entirely to the determination of the Industrial Commission, and its discretion in this respect will not be disturbed in the absence of fraud or other gross abuse of discretion.

Answering your question specifically, it is my opinion that inasmuch as the Industrial Commission at the time of employing the persons above mentioned as Referee and Supervisor of Publication and Printing, respectively, designated the same as experts or technical assistants, such designation is final and must be followed by your Commission unless it appears that in making such designation there was gross abuse of discretion or fraud.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

2239.

TAX AND TAXATION—PERSONAL PROPERTY—SHARES OF FOREIGN CORPORATIONS, NOT DOING BUSINESS IN OHIO, MAY BE EXEMPTED.

SYLLABUS:

1. *Foreign corporations, which are not doing business in Ohio, but are subject to the payment of a franchise fee by the provisions of Sections 5495, et seq., General Code, may exempt their shares from taxation in Ohio as personal property in accordance with the provisions of Section 5499, General Code, although such corporations need not comply with the provisions of Sections 178 and 183, General Code.*

2. *The provisions of Section 5499, General Code, which was enacted later than Section 192, General Code, are now controlling and a foreign corporation seeking to exempt its shares from taxation in Ohio must pay a franchise fee computed upon the entire value of its issued and outstanding stock.*

COLUMBUS, OHIO, June 18, 1928.

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

DEAR SIR:—This will acknowledge your communication reading as follows:

“Your attention is directed to Section 192 of the General Code as amended in 111 O. L. 35 and to Section 7 of the act passed April 20, 1927, 112 O. L. 410 (G. C. 5499). As you know, Section 192 has reference to the exemption from taxation of shares of a foreign corporation electing, etc., under the section. However, Section 7 of the act of 1927 now apparently controls.

Under this section it seems that such a corporation must pay a franchise fee computed on the entire issued and outstanding shares which is somewhat different from the provisions of Section 192, either originally or as amended, and also different from Code Section 5372, which last section is one of long standing, it previously being found both in Section 59 of the act of 1859 and Section 13 of the act of 1878.

Your opinion is requested as to whether or not it is possible for a corporation to elect to exempt its shares without previously thereto quali-

ying in this department under Sections 178 and 183 of the General Code. In this same connection your opinion is also requested as to which of the various Code sections above referred to are at the present time applicable.

In passing, your attention is called to the fact that Section 5499, G. C., refers to an election by a foreign corporation "as provided by law." The only provision in the law of which I am aware authorizing election by a foreign corporation to exempt its shares is the provision of Section 192, G. C. You will also note that under Section 5499, G. C., such an election is to pay 'in lieu of the franchise tax prescribed therein'.

I am informed by a representative of the Tax Commission that that department is equally interested in the question presented by this letter. You will accordingly be good enough to mail copy of the opinion to the Commission, attention of Mr. Reed."

Section 5499, General Code, provides in part as follows:

"On or before June 15th the auditor of state shall charge for collection from each such corporation a fee of one-eighth of one per cent for each of the years 1927 and 1928 and one-tenth of one per cent for each year thereafter upon such value so certified, and shall immediately certify the same to the treasurer of state, provided, however, that no fee shall be charged from any corporation which shall have been adjudicated a bankrupt, or for which a receiver shall have been appointed or which shall have made a general assignment for the benefit of creditors, except for the portion of the then current year during which the tax commission shall find such corporation had the power to exercise its corporate franchise unimpaired by such proceedings or act. But in no case shall the fee be less than twenty-five dollars.

Provided, further, if any foreign corporation elects, as provided by law, to exempt its shares of stock from taxation in Ohio as personal property, it shall pay in lieu of the franchise tax prescribed herein, a franchise tax upon the entire value of its issued and outstanding shares of stock determined as aforesaid, and without apportionment. A foreign corporation making this election shall set forth such fact in its annual report to the tax commission and thereupon its franchise fee shall be computed upon the entire value of its issued and outstanding stock as herein provided. \* \* \* "

The preceding section provides the method of determining the value of the issued and outstanding shares of stock of each domestic and foreign corporation which is subject to the payment of the franchise fee. The corporations subject to this fee are described in Section 5495, General Code, as follows:

"The tax provided by this act for domestic corporations shall be the fee charged against each corporation organized for profit under the laws of this state, except as provided herein, for the privilege of exercising its franchise during the calendar year in which such fee is payable and the tax provided by this act for foreign corporations shall be the fee charged against each corporation organized for profit under the laws of any state or country other than Ohio, except as provided herein, 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."

As I have recently heretofore pointed out in Opinion No. 1811, rendered to The Tax Commission of Ohio, on March 5, 1928, the field of the franchise fee has been appreciably broadened by the amendments of the sections above referred to, which were incorporated as a part of Amended Substitute Senate Bill No. 22, enacted by the last Legislature. The discussion of this subject contained in that opinion is long and I need not quote therefrom, since I assume that you are familiar with that opinion. It was there held that a corporation may be assessed a franchise fee although it is not doing business in this state. That is to say, the provisions of Section 5495, General Code, are such as to apparently require the payment of a franchise fee in the event that a foreign corporation merely owns or uses a part or all of its capital or property in this state. Prior to the enactment of that section in 111 O. L., foreign corporations were not required to pay a franchise fee unless they were actually doing business in this state.

Since the fee requirement is not dependent upon the actual doing of business in this state, it is necessary to determine whether or not Sections 178 and 183 must be complied with by a foreign corporation before it is subject to the payment of the franchise fee. Section 178, General Code, provides as follows:

“Before a foreign corporation for profit transacts business in this state, it shall procure from the secretary of state a certificate that it has complied with the requirements of law to authorize it to do business in this state, and that the business of such corporation to be transacted in this state, is such as may be lawfully carried on by a corporation, organized under the laws of this state for such or similar business, or if more than one kind of business, by two or more corporations so incorporated for such kinds of business exclusively. No such foreign corporation doing business in this state without such certificate shall maintain an action in this state upon a contract made by it in this state until it has procured such certificate. This section shall not apply to foreign banking, insurance, building and loan, or bond investment corporations.”

You will observe that this section must be complied with as a condition precedent to the transaction of business in this state by a foreign corporation.

Section 183, General Code, provides as follows:

“Before doing business in this state, a foreign corporation organized for profit and owning or using a part or all of its capital or plant in this state shall make and file with the secretary of state, in such form as he may prescribe, a statement under oath of its president, secretary, treasurer, superintendent or managing agent in this state, containing the following facts:

1. The number of shares of authorized capital stock of the corporation and the par value of each share.
2. The name and location of the office or offices of the corporation in Ohio and the names and addresses of the officers or agents of the corporation in charge of its business in Ohio.
3. The value of the property owned and used by the corporation in Ohio, where situated, and the value of the property of the corporation owned and used outside of Ohio.
4. The proportion of the capital stock of the corporation represented by property owned and used and by business transacted in Ohio.”

This section also makes compliance therewith a condition precedent to doing business in this state.

It accordingly follows that, if a franchise fee may conceivably be charged a corporation which does not, within the meaning of Sections 178 and 183, General Code, transact business in this state, such corporation may likewise obtain the benefits of the election provided by Section 5499, General Code, and thereby exempt its shares of stock from taxation in Ohio as personal property.

You call my attention, however, to the fact that Section 5499, General Code, is different in terms from Section 192 of the General Code, which provides in part as follows:

"No person shall be required to list for taxation a share of the capital stock of an Ohio corporation; or a share of the capital stock of a foreign corporation, the property of which is taxed in Ohio in the name of such corporation; or a share of the capital stock of any other foreign corporation provided such corporation, for the privilege of exercising its franchise in Ohio, elects to pay and pays annually a franchise tax at the times, in the manner, on the basis and in the amount prescribed by law for domestic corporations. \* \* \* "

The important difference between these sections is that Section 192 is an exemption from listing the stock provided the foreign corporation pays as a domestic corporation, whereas as Section 5499, *supra*, exempts the shares from taxation, provided the corporation pays a franchise fee computed upon "the entire value of its issued and outstanding stock." While in the one case it is an exemption from listing and in the other the stock itself is exempt from taxation, in my opinion the two sections must be construed as accomplishing the same thing. Consequently, Section 5499, being the later section, must control and accordingly the corporation must, in order to secure the exemption of its stock from Ohio taxation, pay the franchise tax upon the entire value of its issued and outstanding stock. If this be done, I am of the opinion that the shares of the foreign corporation so paying, are exempt from taxation in Ohio as personal property.

Specifically answering your questions therefore, I am of the opinion that:

1. Foreign corporations, which are not doing business in Ohio, but are subject to the payment of a franchise fee by the provisions of Sections 5495, et seq., General Code, may exempt their shares from taxation in Ohio as personal property in accordance with the provisions of Section 5499, General Code, although such corporations need not comply with the provisions of Sections 178 and 183, General Code.
2. The provisions of Section 5499, General Code, which was enacted later than Section 192, General Code, are now controlling and a foreign corporation seeking to exempt its shares from taxation in Ohio must pay a franchise fee computed upon the entire value of its issued and outstanding stock.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*