

121

INSURANCE POLICIES—APPLICATIONS MADE BY OHIO APPLICANTS—PREMIUMS SENT BY MAIL TO HOME OFFICE OF FOREIGN INSURANCE COMPANY—NOT LICENSED TO DO BUSINESS IN OHIO—POLICIES ISSUED—MAILED TO OHIO APPLICANTS—TAXES MAY NOT BE RECOVERED BY STATE OF OHIO ON PREMIUMS—SECTION 5432 ET SEQ., G. C.

SYLLABUS:

Where applications for insurance policies are made and premiums sent by mail by Ohio applicants to the home office of a foreign insurance company, not licensed to do business in Ohio, and policies are issued by said insurance company by mail to Ohio applicants, taxes may not be recovered by the state of Ohio on said premiums under Section 5432, et seq., of the General Code.

Columbus, Ohio, February 9, 1945

Hon. Walter Dressel, Superintendent of Insurance
Columbus, Ohio

Dear Sir:

Your request for my opinion, submitted in the letter of your predecessor, reads as follows:

"An application is pending in this office on behalf of the Cuna Mutual Insurance Society, a legal reserve life insurance company incorporated under the laws of Wisconsin. The annual statement filed in connection with this application discloses that during the past several years, the Society has issued contracts covering residents of Ohio which raises the question as to the liability of the Society to the State of Ohio for taxes upon the premiums collected under such contracts.

The Society specializes in writing so-called creditors' group insurance on the lives of the borrowers who secure loans from local credit unions.

Our investigation discloses that the business now in force was produced by mail. The Society sends literature to the various credit unions located in this state advertising its loan protection coverage. As a result of this direct mailing advertising, as well as magazine advertising, various local credit unions have made application by mail for such group coverage to the home office in Wisconsin. Pursuant thereto, the Society has issued the contracts applied for and forwarded them to the local credit unions by mail. We are informed that at no time have representatives of the Society personally solicited insurance within the State of Ohio. All premiums on the contracts in question have been paid by mail to the home office.

Before acting upon the pending application to license the Society to do business in this state, I desire your opinion upon the question whether the State of Ohio is entitled to collect premium tax pursuant to Sections 5432 et seq., General Code, based upon the premiums heretofore collected by the Society from residents of Ohio in the manner heretofore stated. If the state is entitled to collect such tax, may it be collected on all Ohio business heretofore procured regardless of time?"

Section 5432 of the General Code became effective in its present form on January 1, 1934, and reads as follows:

“Every insurance company incorporated by the authority of another state or government, in its annual statement to the superintendent of insurance, shall set forth the gross amount of premiums received by it from policies covering risks within this state during the preceding calendar year, without any deductions whatever. It shall also set forth therein in separate items, return premiums paid for cancellations and considerations both paid to or received from other companies for reinsurances in this state during such year. If the superintendent of insurance has reason to suspect the correctness of such statement he may make an examination, at the expense of the state, of the books of such company or its agents for the purpose of verifying them.”

Section 5433 of the General Code became effective on January 1, 1934, and reads as follows:

“If the superintendent of insurance finds such report to be correct he shall compute an amount of two and one-half per cent of the balance of such gross amount after deducting such return premiums and considerations paid for reinsurance in companies admitted to do business in this state and charge such amount to such company as a tax upon the business done by it in this state for the period shown by such annual statement. All taxes so collected shall be credited to the general revenue fund of the state.”

The last named Section 5433 was amended effective March 25, 1937, as follows:

“If the superintendent of insurance finds such report to be correct he shall compute an amount of two and one-half per cent of the balance of such gross amount after deducting such return premiums and considerations received for reinsurance and charge such amount to such company as a tax upon the business done by it in this state for the period shown by such annual statement. All taxes so collected shall be credited to the general revenue fund of this state.”

The purpose of Section 5432 is to place the burden on insurance companies incorporated under the authority of another state or government to furnish to the superintendent of insurance of Ohio the “gross amount of premiums received by it from policies covering risks within the state”.

Section 5433 then provides for a tax of two and one-half per cent of the balance of such amount after certain deductions "as a tax upon the business done by it in this state."

The case of Mutual Life Insurance Company of New York v. State of Ohio, reported in 79 O. S., page 305, and decided January 26, 1909, was a suit by the state to recover from the defendant, a life insurance company organized under the laws of New York, a tax of two and one-half per cent on the premiums received by it at the home office in New York by mail directly from policy holders resident of Ohio. At the time of this decision, Revised Statute 2745 was in effect as follows :

"Every insurance company, incorporated by the authority of any other state or government shall, in its annual statement to the superintendent of insurance, set forth the gross amount of premiums received by it in the state during the preceding calendar year, without deductions for commissions, return premiums on considerations paid for reinsurance, or any deductions, whatever; and shall, also, therein set forth, in separate items, return premiums paid for cancellations and also, considerations received from other companies for reinsurances in this state, during such year.

The superintendent of insurance shall examine such report of every such company, and if he finds the same correct, shall, prior to the month of November in each and every year, compute an amount of two and one-half per centum on the balance (of) on such gross amount after deducting such return premiums and considerations received for reinsurances as shown by the next preceding annual statement, and charge (the) to same to such company as a tax upon the business done by it within said state for the period as shown by said annual statement."

It is to be noted that Revised Statute 2745 says "premiums received by it in the state." The court decided that the premiums were not paid in the state and were not taxable. It is also to be noted that the court in its decision suggested that if the statute needed amending, the remedy was with the legislature. Thereafter, Revised Statute 2745 was amended, effective March 23, 1909. The material change effected by such amendment then read :

"Gross amount of premiums received by it from policies covering risks within this state."

This language has been retained to the present time in the statute. It appears, therefore, that the legislature intended at least to attempt to change the law as decided in the case of *Mutual Life Insurance Company of New York v. State of Ohio*, supra.

Section 5433 assumes that the gross premiums found by the report provided to be furnished in Section 5432 is the basis of the two and one-half per cent tax. However, this gross premium could be entirely on business written out of the state but on policies covering risks within the State of Ohio. Section 5433 then goes on to say as a "tax upon the business done by it in the state." This is confusing. It is hardly conceivable that the legislature intended to attempt to tax a company not doing any business in Ohio.

Was the Cuna Mutual Insurance Society doing business in Ohio? The question as to what constitutes doing business in the state is not a question of law but a question of fact and each adjudicated case must be made to rest upon its own facts. See *Short Films Syndicate v. Standard Film Service Co.*, 39 O. App. 79.

While the cases are not entirely in accord, the weight of authority seems to be to the effect that a mail order insurance business, such as indicated by your predecessor in his letter, does not constitute doing business in the state. See *Couch on Insurance*, Vol. I, Section 245b, from which authority I wish to quote:

"And clearly the subject (doing business) is one which lends itself only to a detailed treatment of the cases. * * * And issuing a policy by a corporation of one state on property in another state does not constitute carrying on business in the latter state. So, a New York corporation procuring insurance in New York on Arkansas property, without complying with the laws of the latter state, is not doing business in Arkansas so as to invalidate the contract in that state. Nor is it doing business in one state where the contract is applied for and consummated through the mail in another state."

And in support of the latter statement is cited the case of *Huntington v. Sheehan*, 206 N. Y. 486; 100 N. E. 41.

Continuing from *Couch on Insurance*, Vol. I, Section 245b, at page 568:

“And a mutual society with no paid agents, and which obtains its new members through solicitations of old members, and only accepts them upon acceptance of application and dues at its home office, is not ‘doing business’ in a foreign state merely because an applicant lives there and was solicited by a resident member, so as to give a court of the latter state jurisdiction over the society by service of process upon a state official.”

In support of which is cited *Shwarder v. Illinois Commerce Mens Association*, 255 Fed. 797.

In 29 Am. Jur., Section 41 on insurance and what constitutes doing business within the state, is the following statement:

“Likewise a mutual insurance company is not doing business in a state if it maintains no agents therein, but requires applications for membership to be mailed to its home office in another state, where they are accepted and the contracts are written and mailed and it is immaterial that new members are solicited by old ones residing in the state who have no authority to obligate the company to any contracts.”

I am therefore of the opinion that the State of Ohio is not entitled to collect premium tax pursuant to Section 5432 et seq. of the General Code, based upon the premiums heretofore collected by the Cuna Mutual Insurance Society from residents of Ohio in the manner set forth in your predecessor's letter above referred to, for the reason that said insurance society is not doing business in Ohio.

Respectfully,

HUGH S. JENKINS

Attorney General