

3262.

APPROVAL, BONDS OF NEWTON FALLS CONSOLIDATED SCHOOL DISTRICT, TRUMBULL COUNTY, \$60,000.00.

COLUMBUS, OHIO, April 10, 1926.

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

3263.

LAW RELATING TO THE EXEMPTION FROM THE GENERAL PROPERTY TAX OF STOCK OF FOREIGN CORPORATIONS HELD BY RESIDENTS OF OHIO DISCUSSED—SECTION 192 G. C. CONSTRUED.

SYLLABUS:

1. *A foreign corporation qualified to transact business in this state prior to October 1, 1925, is required to make a report and pay a franchise tax for the year 1926. If when such corporation files its report for 1926 it elects to pay the franchise tax upon the same basis as an Ohio corporation, the stock of said corporation held by residents of Ohio will be exempt from listing for taxation for the year 1926.*

2. *A foreign corporation authorized to do business in this state after October 31, 1925, and prior to April 11, 1926, is not, under the provisions of section 5519 G. C., required to file a report nor pay a franchise tax until 1927. It may, however, elect to report for the year 1926 and to pay a franchise tax for that year on the same basis as an Ohio corporation. The Tax Commission should accept this report when tendered and such acceptance of the report and the payment of the franchise tax will exempt the person owning such stock from listing the same for taxation.*

3. (a) *The exemption from listing stock under the provisions of section 192 G. C. attaches when the report is filed and the election is made to pay as a domestic corporation.*

(b) *The list when certified by the Tax Commission, as containing the names of all foreign corporations whose stock is exempt from listing for taxation on April 11, 1926, should contain those who have regularly filed their reports for 1926 prior to April 11, 1926, and have elected to pay on the basis of Ohio corporations.*

4. *If a corporation fails for any reason to pay the franchise tax so assessed, the stock of such stockholder may be listed by the auditor as omitted property under section 5399, General Code.*

COLUMBUS, OHIO, April 13, 1926.

The Tax Commission of Ohio, Columbus, Ohio.

DEAR SIR:—This will acknowledge receipt of your recent communication, which reads:

“The commission is receiving numerous inquiries as to the exemption from the general property tax of stock of foreign corporations held by residents of Ohio. The answer to these inquiries requires an interpretation of section 192 G. C., 111 O. L., 35. In order that we may be able to answer these inquiries, you are respectfully requested to advise the commission as follows:

"1. A foreign corporation was qualified to transact business in this state prior to October 1, 1925, and is therefore required to make a report and pay a franchise tax for the year 1926. This report is due during the month of April and the tax is payable on or before December 1. If when such corporation files its report for 1926 it elects to pay the franchise tax upon the same basis as an Ohio corporation, will the stock of that corporation held by residents of Ohio be exempt from taxation for the year 1926 or will such corporation be required to pay the tax before its stock held by residents of this state will become exempt?

"2. A foreign corporation is authorized to do business in this state after October 31, 1925, and prior to April 11, 1926. Under the provisions of section 5519 G. C., this corporation is not required to file a report nor pay a franchise tax until 1927. It, however, has notified the commission that it elects to report for the year 1926 and to pay franchise tax for that year on the same basis as an Ohio corporation. Must the Commission accept this report if, as and when tendered and certify its stock value to the auditor of state? Or should the same be rejected? Or is it discretionary with the Commission to accept or reject the same? And would such acceptance of report and election and payment of tax exempt the stock of such corporation from property tax in 1926?

"3. We have been asked to certify for the benefit of county auditors a list of stocks of foreign corporations exempted by this section from property tax on tax listing day, April 11, 1926. It becomes necessary therefore for you to advise us as to the date on which exemption attaches.

- "I. (a) Is it when the franchise tax report is filed or
 (b) When the election to pay as a domestic corporation
 (c) When payment of tax is made after election has been filed?

"II. Should the list when so certified by us as containing the names of all foreign corporations whose stock is exempt from tax on April 11, 1926, be limited to those only who elect to pay and did pay franchise tax as Ohio corporations in the year 1925? Or should it include the names of similar corporations who have regularly filed their reports for 1926 prior to April 11, 1926, and have accompanied the same with elections to pay as aforesaid? Or should it include the names of all foreign corporations who before tax listing day have filed elections to pay, regardless of whether their reports have been at that time forthcoming? Or should it include the names of foreign corporations who report after April 11, 1926, and elect to pay on the basis of a domestic corporation for 1926? Or should the Commission refuse to certify any list for 1926 until after it has become apparent as to what foreign corporations have not only elected to pay but paid as domestic corporations?"

As stated in the Commission's letter, the answer to the inquiries therein requires the interpretation of section 192 of the General Code, as amended in 111 O. L., page 35.

In tracing the history of this section it appears that the first act requiring foreign corporations to pay a fee for admission to do business in Ohio was the enactment of section 148c on May 16, 1894, (91 O. L., 272). No reference is made in this act to the taxation of stock of foreign corporations.

Section 148c, as amended April 25, 1898, (93 O. L., 225) does not refer to the taxation of stock. On April 14, 1900, section 148c was again amended (94 O. L., 225). Here, after prescribing the fee which a foreign corporation must pay for the privilege of entering the state to transact business, it is provided that a corporation may

file a list of its Ohio stockholders with the secretary of state before April 25th in any year, and if such list shows that the aggregate amount of stock owned by residents of Ohio does not exceed the aggregate amount of property returned by the corporation for taxation, such stockholders are not required to list their stock for taxation; if it does exceed the amount returned by the corporation for taxation, the stockholders must list only the proportionate value of their shares represented by the amount of the excess of the total stock in Ohio over the aggregate amount of property returned by the corporation for taxation. It is further provided that if all of the business of the foreign corporation is transacted in the state and all of its property located and taxed here, the stock need not be listed.

Neither domestic nor foreign corporations were required to pay any annual franchise fees for the privilege of doing business in Ohio until the passage of the Willis Law in 1902 (95 O. L., 124), providing for an annual tax on domestic and foreign corporations. Section 148c G. C. governing the admission of foreign corporations, was again amended this same year (95 O. L. 539) following the enactment of the Willis Law, and contains a section providing that where a stockholder of a foreign corporation shows on demand of the taxing authorities that two-thirds of the property of such corporation is taxed in Ohio and the remainder in other states, he is not required to list his stock for taxation, provided that the foreign corporation pays the annual franchise tax on its entire capital stock, and not merely on that proportion which is represented by property and business in Ohio.

On April 25, 1904, section 148c G. C. was amended again (97 O. L., 496). The title of this act is significant: "To amend an act entitled 'An act to amend section 148c of the Revised Statutes of Ohio,' and to relieve owners of shares in both foreign and domestic companies from double taxation."

This is again a law for qualifying foreign corporations to do business in Ohio, and contains section 192 in substantially the form in which it stood prior to its amendment by the last General Assembly on March 5, 1925 (111 O. L., 35). The only change from the act of 1902 is the provision that no person shall be required to list for taxation the shares of the capital stock of an Ohio corporation.

Section 192 G. C. and its predecessors were thus enacted as a part of the law relating to the admission of foreign corporations to Ohio until the last amendment in 1925. Subsequent to 1904 it was renumbered by the Codifying Commission and separated from those sections providing for the admission of foreign corporations to do business in the state.

This brief history of this legislation shows that it is not a new thing in Ohio to exempt the listing of stock of foreign corporations from taxation and place it upon an equality with the stock of Ohio corporations in this respect provided the requirements of the statute are fulfilled. Moreover, the incorporation of this legislation with that authorizing foreign corporations to enter Ohio would indicate that the legislature intended this as an inducement to such corporations to do business here with a large proportion of their property and to increase the revenue of the state both by the property tax and the additional franchise fee necessary to exempt their stockholders from listing this stock for taxation. It appears that no one has questioned the validity of section 192 G. C. as it stood before the recent amendment. Until that time it was merely necessary for a stockholder to show that two-thirds of the property of the foreign corporation was taxed in Ohio and the balance in other states, and that the corporation paid the annual tax upon its entire capital stock.

The title to this new act as amended, is as follows:

"To further define the duties of persons required to list property for taxation and to provide for the payment of franchise fees by foreign cor-

porations for the year one thousand, nine hundred and twenty-four, by amending section 192 of the General Code and declaring an emergency."

The only change from the previous law is that a stockholder is no longer required to show that two-thirds of the property of the foreign corporation is taxed in Ohio and the balance in other states, but merely that the corporation "elects to pay and pays annually a franchise tax at the time, in the manner, on the basis and in the amount prescribed by law for domestic corporations."

There is a special provision in the act applying to foreign corporations which were in the state at the time of its enactment, permitting them to elect on or before April 11, 1925, to pay within one hundred days after the passage of the act, the amount of franchise tax for the year 1924 as provided for domestic corporations, and upon such election the holders of the stock of such corporations shall not be required to list for taxation or pay the tax on their shares for the year 1924. The purpose of this provision is shown by section 3 of the act in 111 O. L., but which does not appear in section 192 G. C. in the 1926 edition of Page's General Code. This section 3 declares the law to be an emergency arising from the fact that a decision of the Supreme Court of the United States has declared unconstitutional the Ohio law taxing foreign corporations, resulting in a great loss of revenue to the state and in inequality in taxation as against domestic corporations, to remedy which the immediate passage of this act is necessary. In October, 1924, the Supreme Court of the United States, in the case of Air Way corporation vs. Day, 266 U. S. 71, had declared the foreign corporation law of Ohio unconstitutional, and this relieved foreign corporations from paying any annual franchise tax for the year 1924 as this tax did not become due until December 1924, subsequent to the decision of the Supreme Court, and thus a large amount of revenue was lost to the state.

As foreign corporations were thus not permitted to pay any franchise tax in December, 1924, those Ohio residents who had been stockholders in such corporations for that year could not comply with section 192 G. C., as it then stood, which required them to show that the corporation paid the annual franchise tax for that year. Therefore, their stock must have been listed for taxation for the year 1924 had not the above special provision permitting foreign corporations to pay the annual franchise tax in 1924 within one hundred days after the passage of the act been made and this appears to be the only reason for its inclusion.

So far as concerns corporations which come into the state after April 11, 1925, or seek to exempt their stock from taxation after that date, the law governing taxation of this stock is set forth in the following language of the act:

"No person shall be required to list for taxation * * * 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 question as to whether a corporation which enters the state less than six months prior to April 1st in any year can make the election provided by section 192 G. C. is raised for the reason that under section 5519 of the General Code such a corporation would not become liable to file a report or pay any annual franchise tax until the following year. Section 192 G. C. does not warrant a negative answer to this question. It merely requires an election to pay and an annual payment of a franchise tax at the times, in the manner, on the basis and in the amount prescribed by law for domestic corporations. It is only necessary to turn to the law relating to domestic corporations to ascertain the times, manner, basis and amount

which they are required to pay. The present law on this subject is found in 111 O. L., 471. This requires such corporations to file an annual report during the month of April and pay the tax based on such report on the first day of the following December. Section 5519 G. C., which was originally enacted as section 7 of the Willis Law in 1902 and has thus been the law ever since corporations have been required to pay annual franchise taxes, makes the provision that a domestic corporation incorporated within less than six months prior to the date when it is required to file its annual report, or a foreign corporation admitted to do business within such six months period, shall not be required to file its report until the following year, as otherwise such corporations might be required in effect to make payments in advance. Under a different construction of section 192 G. C. no corporation formed after September in any year could secure exemption from taxation for its stockholders until the second year following. This would not only work a hardship upon the stockholders of such a corporation who had purchased their stock relying on the exemption provided by section 192 G. C., but would be a discrimination against them as compared with the owners of stock in a domestic corporation formed at the same time. The history of this legislation as set forth above shows that it has been the consistent policy of the legislature not to discriminate between the holders of stock of domestic and foreign corporations provided the latter comply with the express conditions of the statute. There is nothing in section 192 G. C. to indicate that any such discrimination was intended. In fact the General Assembly was careful to incorporate a special provision in the law for the benefit of stockholders who had been deprived of their protection by an unexpected decision of the Supreme Court, indicating an intention, at least by implication, not to permit any gap in the law which would discriminate unfairly against the stockholders of a foreign corporation which had done everything within its power to comply with the law. A different construction would arbitrarily create such a gap as the General Assembly was careful to prevent by its special provision for 1924. It would make it impossible for a corporation coming into the state during one-half of the year to comply with the law which by its very language was intended to apply to all corporations which complied with its provisions, and not merely those which happened to come into the state between April and September of any year. The history of this legislation shows a consistent purpose on the part of the General Assembly for twenty-five years not to discriminate against the holders of stock in those corporations which are willing to pay the higher taxes necessary to place them in the same class with stockholders of domestic corporations. The plain words of section 192 G. C. can have but one meaning, and that is that a foreign corporation, no matter when it qualifies to do business in Ohio, may comply by filing its election in the language of the statutes "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."

It would seem that the intent of amended section 192 G. C. was to secure from foreign corporations largely increased franchise taxes. As an inducement, the stockholders of such corporations are placed upon an equality with the stockholders of domestic corporations with respect to the exemption of their stock from the general property tax, the principal purpose being to increase the state revenue, the exemption from listing being merely incidental. The amended section should, therefore, be given a construction to accomplish this purpose.

It is clear that this purpose would be partially defeated if the privilege were limited to corporations which availed themselves of the act during 1925. The same is true if recently qualified corporations are forbidden to elect to pay and pay the franchise tax by reason of the fact that they are not required to do so.

Section 5519 G.-C. which provides that the first annual report cannot be required until the proper month for the filing of such report next following the expiration of six months from the date of filing articles of incorporation or admission to do business in this state, does not prohibit the filing of an annual report and the payment of the franchise tax by such corporation. It cannot reasonably be supposed that the legislature intended to limit the class of companies which might pay additional revenue to the state in exchange for exemption from listing of their stock from taxation to those which actually did so in 1925.

As before stated the payment of the franchise tax by the foreign corporation is for the current year, and not for the following year. The only thing in section 192 G. C., which might lead to a different construction is the phrase, "elects to pay and pays." Under the franchise tax law, the payment cannot be made until long after tax-listing day. In this connection the following points may be considered.

The corporation franchise tax is an annual fee for the privilege of exercising its corporate franchise and doing business in the calendar year in which the tax is payable. (Section 5499 G. C.)

The exemption of the stock of a foreign corporation depends upon an annual election and payment of the franchise tax. (Section 192 G. C.)

The return, the listing and valuation of personal property for taxation is made annually. (Sections 5366 and 5366-1 G. C.)

The corporation annual report and election are made during the month of April.

The personal return for taxation is made between the second Monday in April and the first day of May, inclusive.

The listing of personal property is made between the second Monday of April and the first Monday of May.

There seems, therefore, no practical difficulty in the way of giving effect to an exemption of the stock of a foreign corporation in the year for which franchise tax is paid. The second sentence of amended section 192 G. C. in regard to the 1924 tax and exemption, supports this construction. If the act is there made retroactive, the exemption is stated to be for the year for which the tax is paid. The universal practice under original section 192 G. C. was that the exemption from listing was allowed for the year in which the additional franchise tax was paid by the foreign corporation. Amended section 192 G. C. does not differ from original section 192 G. C. in respect to this point and it is presumed that the legislature re-enacted said law with a knowledge of the general practice.

The exemption from listing is not final unless the full tax is finally paid in the manner, and in the amount, and on the basis prescribed by law for domestic corporations, and a failure to pay after an election to do so by a foreign corporation would result in the defeat of the exemption. It is within the power of the county auditor under section 5399 G. C. to add such stocks to the duplicate and assess the taxes thereon. The election would be binding and the full amount of the franchise tax could be collected from the corporation as are other delinquent taxes.

It is therefore believed that the Commission's inquiries should be answered as follows:

1. A foreign corporation qualified to transact business in this state prior to October 1, 1925, is required to make a report and pay a franchise tax for the year 1926. If when such corporation files its report for 1926 it elects to pay the franchise tax upon the same basis as an Ohio corporation, the stock of said corporation held by residents of Ohio will be exempt from listing for taxation for the year 1926.

2. A foreign corporation authorized to do business in this state after October 31, 1925, and prior to April 11, 1926, is not under the provisions of section 5519 G. C., required to file a report nor pay a franchise tax until 1927. It may, however, elect to

report for the year 1926 and to pay a franchise tax for that year on the same basis as an Ohio corporation. The Tax Commission should accept this report when tendered and such acceptance of the report and the payment of the franchise tax will exempt the person owning such stock from listing the same for taxation.

3. (a) The exemption from listing stock under the provisions of section 192 G. C. attaches when the report is filed and the election is made to pay as a domestic corporation.

(b) The list when certified by the Tax Commission, as containing the names of all foreign corporations whose stock is exempt from listing for taxation on April 11, 1926, should contain those who have regularly filed their reports for 1926 prior to April 11, 1926, and have elected to pay on the basis of Ohio corporations.

4. If a corporation fails for any reason to pay the franchise tax so assessed, the stock of such stockholder may be listed by the auditor as omitted property under section 5399, General Code.

Respectfully,
C. C. CRABBE,
Attorney General.

3264.

APPROVAL, BONDS OF BRISTOL TOWNSHIP RURAL SCHOOL DISTRICT, TRUMBULL COUNTY, \$50,000.00.

COLUMBUS, OHIO, April 12, 1926.

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

3265.

ROADS AND HIGHWAYS—DISCUSSION OF THE AUTHORITY OF COUNTY COMMISSIONERS AND THE DIRECTOR OF HIGHWAYS IN THE CONSTRUCTION, MAINTENANCE AND REPAIR OF ROADS IN THE STATE SYSTEM.

SYLLABUS:

1. *County commissioners are without authority to acquire property for the sole purpose of widening a road which is a part of the state system.*

2. *In the maintenance, repair or reconstruction of an inter-county highway or main market road, by the director of highways and public works, under the provisions of section 1224, General Code, either with or without the cooperation of county commissioners or township trustees, the director of highways and public works is authorized to acquire property for the sole purpose of widening such highway or road to such width as he, in his discretion, may deem necessary.*

3. *To lay out a county road sixty feet wide, immediately adjacent to and paralleling an inter-county highway or main market road, would, in effect, be a widening of such inter-county highway or main market road, and county commissioners are without authority to so widen such highways or roads.*

4. *The word "repair," as used in section 1224 of the General Code, means to mend, add to or make over the original improvement to such an extent as may be necessary to restore the original improvement to the required standards.*