

It is altogether probable that said George W. Singer and his wife fully intended to convey to Edward Cunningham all of their right, title and interest in said land, and it is likewise quite probable that you are entirely correct in your assumption that the possibility of any question with respect to the effect of this deed being raised by any of the heirs of George W. Singer is so remote that the state would be taking little chance in accepting and paying for the property here in question. However, I feel that this is a matter which your department should determine and that this department should not take upon itself any responsibility other than to advise you as to my opinion with respect to the legal question here presented.

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

2619.

CORPORATION—STOCK OF FOREIGN CORPORATION—NOT SUBJECT  
 TO FRANCHISE TAX—TAXATION OF CORPORATION AS PERSONAL  
 PROPERTY DISCUSSED.

**SYLLABUS:**

*A foreign corporation, which is not subject to the franchise tax, cannot secure the exemption of its shares from taxation in Ohio as personal property in accordance with the provisions of Section 5499, General Code.*

COLUMBUS, OHIO, September 24, 1928.

*The Tax Commission of Ohio, Columbus, Ohio.*

GENTLEMEN:—This will acknowledge your recent communication as follows:

"Under date of March 29, 1928, the Commission received a report from The Indiana Refrigerating Company made upon the form provided for the annual report for the year 1928 of a foreign corporation. Similar reports were received from the East Chicago Dock Terminal Company and The North Pier Terminal Company. Each company in its report stated under item 19 thereof, that it elected as provided by law to exempt its shares of stock from taxation in Ohio as personal property. The statement was made upon each report that the entire capital stock of each company was owned by the Interstate Terminal Warehouses, Incorporated, an Ohio corporation of Cleveland, Ohio.

These companies have not complied with the provisions of Section 178 and 183 of the General Code. The reports which were filed by them in which the election was made to exempt the shares of stock from taxation as personal property indicate that all of the property is located outside the State of Ohio; that there was no business transacted in Ohio.

Kindly advise the Commission whether these companies can elect to exempt their shares of stock from taxation in Ohio as personal property by paying the franchise fee upon the entire value of their shares of issued and outstanding stock without apportionment when they have not filed certificates of compliance under the provisions of Sections 178 and 183 and when the reports submitted by them show no property owned in Ohio or no business transacted in Ohio. Under the provisions of Sections 5495, et seq., General Code, there would be no liability for franchise tax.

Will you kindly, also, advise the Commission whether the reports submitted should be accepted and certification made to the proper officer upon which to make charge for franchise fee based upon the entire value of the shares of issued and outstanding capital stock.

In view of the fact that no certification has as yet been made upon which to make charge for franchise tax and as the time within which the franchise fee can be paid without penalty is short, we ask that you render your opinion upon these questions at as early a date as possible."

In an opinion of this office, No. 2239, dated June 18, 1928, and addressed to the Hon. Clarence J. Brown, Secretary of State, Columbus, Ohio, certain conclusions were reached which in my opinion are dispositive of the question which you now present.

The syllabus of this opinion is as follows:

"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."

You will observe that I there held a foreign corporation is entitled to secure the exemption of its shares from taxation in Ohio, under Section 5499, General Code, where such corporation is subject to the payment of a franchise fee under the provisions of Sections 5495 et seq., General Code. This conclusion was reached upon an examination of the language of Sections 5499 and 192, General Code, which sections provide in part as follows:

Section 5499. "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. \* \* \*

Section 192. "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. \* \* \*

In that opinion I invited attention to the fact that Section 5499, *supra*, granted the privilege of paying the franchise tax upon the entire value of its issued and outstanding shares *in lieu of the franchise tax*. I may state that Section 192, *supra*, also provides that the election therein mentioned is to pay for the *privilege of exercising its franchise in Ohio*. A foreign corporation must, by the terms of these sections, pay upon the entire amount of its issued and outstanding shares in lieu of something. Quite evidently the statutes mean in lieu of the franchise tax. The franchise tax is payable under three contingencies, namely:

1. Where a foreign corporation has qualified under Sections 178 and 183, General Code, and received authority to do business in this state.
2. Where a foreign corporation owns property in this state.
3. Where a foreign corporation does business within this state.

In any of these instances the corporation is liable for the payment of the franchise tax, and hence it may accept the alternative provided in Section 5499, *supra*, and exempt its shares from taxation as personal property in Ohio. Unless, therefore, a corporation comes within one of these classes and is subject to the franchise tax, there is no authority for it, by voluntary payment upon its entire issued and outstanding shares of stock, to obtain the benefits of the section in question.

The situation presented in this instance is similar to that which arose in the case of *Bigalow Fruit Co. vs. Armour Car Lines*, 74 O. S. 168. There a foreign corporation engaged in Ohio solely in interstate commerce, sought to qualify in this state under R. S. 148c (now Section 183, General Code), and so secure the privilege of exemption from attachment extended under that section to those corporations so qualified. The corporation in question was, however, by express exceptions, not subject to the provisions of Sections 183 et seq., General Code. Under those circumstances the court held that the voluntary compliance and qualification of the corporation did not entitle it to the privilege of exemption from attachment, the court saying, on page 172:

"If it is a foreign corporation engaged in interstate commerce in whole or in part, for there is no distinction made in the statute as to parts, it is not subject to, nor entitled to the privileges of, Section 148c; and therefore it cannot comply with Section 148c so as to obtain exemptions from attachment. A mere voluntary compliance with this section, by a corporation which is not within its purview, is an empty and meaningless form."

Applying the foregoing principle to the instant case it is readily to be observed that the corporations in question, being by no possibility subject to the Ohio franchise tax, cannot make a payment in lieu of that tax so as to acquire the benefits of exempting their shares from Ohio taxation in accordance with the provisions of Section 5499, *supra*.

Accordingly, in specific answer to your inquiry, I am of the opinion that a foreign corporation, which is not subject to the franchise tax, cannot secure the exemption of its shares from taxation in Ohio as personal property in accordance with the provisions of Section 5499, General Code.

Respectfully,

EDWARD C. TURNER,  
*Attorney General.*