

1487.

TAX AND TAXATION—NON-RESIDENT CORPORATION—SITUS OF CREDITS FOR TAXATION—METHOD OF DETERMINATION.

SYLLABUS:

Credits of a non-resident corporation may be taxed in Ohio, only when they are localized by being committed to the charge and management of an agent or other representative who is more than a mere custodian or collector, and who has power to deal in a managerial capacity with the fund represented by the credits.

COLUMBUS, OHIO, December 30, 1927.

The Tax Commission of Ohio, Wyandotte Building, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your recent communication which reads:

“The Tax Commission of Ohio is desirous of having a formal opinion from your office relative to the following question:

Under what circumstances may the county auditor as the assessor of personal property, require foreign corporations to list their credits for taxation when their business is conducted in a manner described in the succeeding paragraph?

Some corporations have agents located in Cuyahoga County who receive goods from the parent company and collect proceeds, and after paying expenditures remit the balance to the home office. In other cases a branch agency is created, goods are received from the parent office, but the billing and collecting is done solely by the home office, it being said there are no local collections whatsoever by the local agent in charge. In view of the new conditions we would like your ruling as to the taxability of monies on deposit in Cuyahoga County together with credits arising out of a company's business under the following circumstances:

Cases A—A stock of goods is maintained in Cleveland and a sales organization is there represented.

1. The billing is done in New York (for example) while the collecting is done in Cleveland.
2. The billing is in Cleveland, the collecting in New York.
3. The billing and collecting is done in Cleveland.
4. The billing and collecting is done in New York.

Cases B—No goods are maintained in Cleveland but a sales organization exists there.

1. The billing is done in New York (for example) while the collecting is done in Cleveland.
2. The billing is in Cleveland, the collecting in New York.
3. The billing and collecting is done in Cleveland.
4. The billing and collecting is done in New York.

In the above cases, Classes A and B, what difference does it make if the sales are not completed until approved by the New York office. The billing, as well as collecting, when done by New York is of course done by correspondence except when the account becomes delinquent, in which latter case the sales organization is called upon for assistance.

We are enclosing herewith copy of facts and arguments submitted in a concrete case in which the county of Cuyahoga is an interested party.”

Section 5327, General Code, reads in part:

"The term 'credits' as so used, means the excess of the sum of all legal claims and demands, whether for money or other valuable thing, or for labor or service due or to become due to the person liable to pay taxes thereon, including deposits in banks or with persons in or out of the state, other than such as are held to be money, as hereinbefore defined, when added together, estimating every such claim or demand at its true value in money, over and above the sum of legal bona fide debts owing by such person."

The definition of "credits" in G. C. Section 5327 is in accordance with the meaning of "credits" in Article XII, Section 2 of the Ohio Constitution; and this statute is constitutional: *Tax Commission vs. Castings Co.*, 111 O. S. 117; *Insurance Co. vs. Hess*, 25 O. N. P. (N. S.) 409.

Section 5404, General Code, reads as follows:

"The president, secretary, and principal accounting officer of every incorporated company, except banking or other corporations whose taxation is specifically provided for, for whatever purpose they may have been created, whether incorporated by a law of this state or not, shall list for taxation, verified by the oath of the person so listing, all the personal property thereof, and all real estate necessary to the daily operations of the company, monies and credits of such company or corporation within the state, at the true value in money."

Section 5404, General Code, includes all corporations except banking corporations unless some specific provision is made by statute for the taxation of corporations of that class, whether they are organized in Ohio or not: *Telegraph Co. vs. Poe*, 61 Fed. 449; 8 O. F. D. 158.

Section 5328, General Code, reads as follows:

"All real or personal property in this state, belonging to individuals or corporations, and all moneys, credits, investments in bonds, stocks, or otherwise, of persons residing in this state, shall be subject to taxation, except only such property as may be expressly exempted therefrom. Such property, monies, credits, and investments shall be entered on the list of taxable property as prescribed in this title."

Section 5404, General Code, will not be construed as repealing Section 5328, General Code, by implication: *Coal Co. vs. O'Brien*, 98 O. S. 14.

Section 5328, General Code, passed pursuant to the requirements of Section 2, Article XII of the Constitution requires that "all real or personal property in this state * * * shall be subject to taxation, except only such property as may be expressly exempted therefrom." The exemption must be clear and expressly stated in the statute and must be such only as the above section of the Constitution authorizes to be exempted: *Wilson vs. Licking Aerie*, 104 O. S. 137.

In an opinion of this department, *Opinions of the Attorney General, 1920, Vol. I*, page 403, it is stated that:

"It will be observed that this section (5328 G. C.), which is intended to define the property which is subject to taxation in Ohio, makes the test of taxability as to the so-called intangibles the residence of the owner in this

state. This is evidently not intended to be applied to corporations at all, and certainly could not be applied to foreign corporations. We may now turn again to Section 5404, G. C., which in its present form requires the principal accounting officer of a corporation to list for taxation 'all the personal property thereof, and all real estate necessary to the daily operations of the company, monies and credits of such company * * * within the state.' The question being as to what 'monies and credits' are 'within the state,' the answer to that question, should it depend upon Section 5328 just quoted, would be that no monies and credits of a foreign corporation at least could have their situs within the state."

In the case of *Hubbard, Treasurer, vs. Brush*, 61 O. S. 252, the second paragraph of the syllabus reads:

"Choses in action whether book accounts, promissory notes, or the like, of foreign corporations that are kept in this state and arise out of the corporate business transacted here, are subject to taxation under the provisions of Section 2744, Revised Statutes." (Now 5404, G. C.)

In an opinion of this department, Annual Reports of the Attorney General, 1912, page 547, the syllabus reads as follows:

"Section 5404 of the General Code, in providing for the taxation of credits existing in Ohio, belonging to non-resident corporations, does not violate Article XIII, Section 4 of the Constitution of Ohio, providing that the property of corporations shall be taxed the same as individuals, for the reason that the credits of non-resident private persons may also be taxed through resident agents.

Credits of a non-resident corporation may be taxed in Ohio, only when they are 'localized' by being committed to the charge and management of an agent or other representative who is more than a mere custodian or collector and who has power to deal in a managerial capacity with the fund represented by the credit.

A corporation cannot have a legal residence apart from its domicile and it conducts business in states other than the state of its incorporation, only through agencies.

The 'constituent acts,' that is, those acts which are necessary to the organization and existence of the corporation itself or its final dissolution, must be performed within the limits of the sovereignty which creates the corporation. Its other business may be conducted in other jurisdictions through its officers acting as agents. The state in which such other business is done, therefore, may tax such credits as are 'localized' therein, that is, such as are fully and completely controlled and managed therein, and if all of the business except the 'constituent' acts are so managed and controlled therein, the property used in and the credits growing out of such business, may be taxed therein."

Said opinion contains an exhaustive discussion of the taxation of credits of foreign corporations. It is stated in the opinion that:

"* * * Now, it is manifest, as I have already stated, that Ohio intends to tax all credits of corporations within its territorial jurisdiction. It is also obvious, as conceded by the court in its opinion, that the general rule is that the situs for taxation purposes of credits, and especially book accounts,

the most 'intangible' of all property rights, is the domicile or taxing residence of the owner. In other words, the right of the state to tax the credits of foreign corporations arises by reason of an exception to the general rule. As the state has manifestly exerted this right to the utmost of its ability it is necessary only to ascertain what the exception to the rule is."

Said opinion then quotes from the case of *Walker vs. Jack*, 88 Fed. 576, as follows:

"It is within the power of the state to tax money and credits of a non-resident when the money is invested, the deed contracted, and the investment controlled by a resident agent of the owner, having the evidence of debt in his possession."

In the case of *In Re Jefferson*, 35 Minn., 215, the court, in speaking of the exception to the general rule that the situs of the credit is the domicile of the owner, said:

"The creditor, however, may give it a business situs elsewhere; as where he places it in the hands of an agent for collection or renewal with a view to retaining the money and keeping it invested as a *permanent business*."

This rule is recognized and applied in the case of *Grant vs. Jones*, 39 O. S. 506, and also in *Myers vs. Seaberger*, 45 O. S. 232.

Judson on Taxation, Section 397, states as follows:

"The state can tax whatever personal property it can *localize* within its jurisdiction."

It is also stated in said 1912 opinion, *supra*, that:

"The problem becomes the ascertainment of what acts or methods of dealing with credits, on the part of a non-resident and his agents within a state, are sufficient to 'localize' the same therein. * * * I think, however, that from all the foregoing cases the following principles may be evolved:

Credits owned by a non-resident are so localized within a state if they are committed to the charge and management of an agent or other representative who is more than a mere custodian or collector and who has power to deal in a managerial capacity with the fund represented by the credit."

In Cooley on Taxation, 4th edition, Section 465, it is stated:

"While the undoubted rule is that, for the purposes of taxation a debt is property at the residence or domicile of the creditor, it is also true that a debt may acquire a situs elsewhere. 'Business situs' has come to be a well recognized term in the laws of taxation. Primarily it is an exception to the rule that the situs of intangible personal property is at the domicile of the owner, so as to make property which has acquired a 'business situs' in a state other than the domicile of the owner taxable in such state. The rule is settled that credits belonging to a non-resident may acquire a business situs so as to be taxable; but just what will constitute a business situs is not susceptible of precise definition. This 'business situs' means, it would seem, what the words indicate, i. e., a situs in another state where a non-resident is doing business through an agent, manager or the like, in which business and as part thereof business credits, such as open accounts, notes, mortgages, de-

posits in banks, etc., are used and come within the protection of the state.

* * *

The same author continues in Section 466 as follows:

"There is no business situs, it is held in the following cases:

(1) Where the business is not continuing in character, as where there is merely a transitory presence of the agent in a sister state, or merely temporary or isolated transactions."

In a footnote the author states:

"It is an indispensable condition of a 'business situs' it seems, that there be something like a general, or more or less continuous, course of business or series of transactions within the state where the property is physically located, as distinguished from merely sporadic and isolated transactions."

"(2) Where the agent in the state is a mere custodian or clerk or order taker."

The author then states in the following notes:

"There is no business situs unless the credits are more or less permanently located in the state or the purpose is to incorporate them when collected into the mass of property of the state. * * * Where non-resident packing company shipped meats to its place of business in the state, for sale by a manager either for cash or on thirty days' time, the money being remitted daily to the company and none of it being invested in the state, and it was held credits for meat sold had no business situs, (citing *City of Vicksburg vs. Armour Packing Company*, 24 S. O. 224)."

"A non-resident manufacturer acquires no 'business situs' within the state, so as to make accounts and notes for sales within the state taxable, where his only agent in the state is a salesman who merely takes orders to be shipped from the factory. (*Endicott, Johnson & Co. vs. Multnomah City*, 96 Ore. 679)."

"There is no business situs where the accounts of the local manufacturing plant were all kept in the home state of the foreign corporation and in fact all the business matters originating in the state were attended to at the home office, (citing *National Metal Edge Box Company vs. Town of Reedsboro*, 94 Vt. 405)."

"Credits, including notes, are not taxable to a foreign corporation which maintains a branch office in the state where pianos are sold and the notes given therefor sent to the home office and returned only for payment and remittance, none of the payments being retained for the use of the local office. (*Kimball Co. vs. Board of Commissioners*, 99 Kansas, 302)."

The rule of business situs depends upon the location of the business in which the credits are used and applies if the other conditions exist, even though the business is transacted without the intervention of a local agent.

In an opinion of this department, Opinions of the Attorney General, 1914, Vol. II, page 1578, it is stated in the syllabus that:

"Where a foreign corporation has its manufacturing establishments and principal managerial offices in other states, but maintains in Ohio a selling agency which manages the business of selling products of the corporation, keeping a stock of its goods on hand, directing the activities of traveling salesmen and other solicitors, and extending credit to customers, the credits arising from such business are taxable to the company in Ohio. The fact that the local agents deposit the money collected by them in bank in Ohio to the credit of the Company and keep one account from which some expenses of the Ohio business are paid upon checks drawn by agents themselves, considered but not deemed material to the conclusion stated."

From the foregoing discussion and authorities cited it appears that credits of a non-resident corporation may be taxed in Ohio, only when they are "localized" by being committed to the charge and management of an agent or other representative who is more than a mere custodian or collector and who has power to deal in a managerial capacity with the fund represented by the credit.

In the concrete case submitted, the facts are summarized in an affidavit as follows:

"(1) Said accounts receivable were created by acceptance at Sioux Falls, S. D., of orders obtained from residents of Cuyahoga County by said McNeilly and the goods represented thereby were produced at the Sioux Falls plant of Morrel & Company.

(2) An interstate shipment of said goods was originated at Sioux Falls, South Dakota, and completed at Cleveland, Ohio, where delivery thereof was made to the customers who had ordered same without any interruption in the interstate transit by retention of said goods in a warehouse at Cleveland or by exercising any dominion over same as the actual delivery from the car to the customer is made by a public drayman who operates on a basis of an independent contractor.

(3) The invoices covering such goods are actually prepared at Sioux Falls, South Dakota, and mailed from that point to the customer in Cuyahoga County, and this invoice so prepared is received by the customer in Cuyahoga County and used by the customer to check the amount of goods received by him when same are delivered by the drayman. The book record of the account receivable so created is kept entirely at Sioux Falls, South Dakota, and said McNeilly does not keep books of record of such accounts receivable.

(4) Payment for the goods so shipped, billed and delivered is made by the customer to Morrel & Company at Sioux Falls, South Dakota. Said McNeilly has no function with respect to such accounts receivable, except where payment of the invoices rendered is not made by the customer in accordance with the terms thereof. In such cases the Sioux Falls office of Morrel & Company advise said McNeilly that a certain account is delinquent and it is said McNeilly's duty to endeavor to have payment sent to Sioux Falls by the delinquent customer and in some cases to transmit checks received by him from the delinquent customer to the Sioux Falls office."

It seems evident, that the credits of said corporation are not subject to taxation in Ohio. Said credits grow out of the solicitation at the City of Cleveland, by a local agent, the order is to be approved by the officers of a corporation situated outside the state, shipment of the goods is to be made from outside the state, invoices are rendered and payments made to the corporation outside the state. In such case it can not be said that the credits are "localized."

Your other questions can not be answered categorically for the reason that insufficient facts are submitted in the several cases mentioned.

Whether or not credits of a non-resident corporation have become localized so as to be subject to taxation in Ohio will depend upon the facts and circumstances of each particular case. Therefore, instead of attempting specific answers to your questions, I have stated general principles which may be applied to each case as it arises in accordance with the particular facts therein.

Respectfully,

EDWARD C. TURNER,

Attorney General.

1488.

COUNTY COMMISSIONERS—DITCH IMPROVEMENT—WORK BEGUN
WITHOUT CONTRACT—NO AUTHORITY TO PAY LABORERS.

SYLLABUS:

A Board of County Commissioners is without authority to pay the wages of day laborers employed by a third person, who, without first entering into a contract therefor as provided by law, (Sections 6442 et seq., General Code), begins the construction of a ditch improvement.

COLUMBUS, OHIO, December 30, 1927.

HON. W. S. PAXSON, *Prosecuting Attorney, Washington C. H., Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter dated December 24, 1927, which reads:

"Several months ago a petition for construction of a county ditch was filed with our county auditor and the county commissioners, upon view, found that the improvement was necessary and ordered the surveyor to prepare plans and profiles, which he did. He was later ordered to let the contract and after advertising for bids he accepted a bid from a party who, without signing a contract or furnishing a bond as provided by statute, began work on the ditch. He employed several men who performed labor in excavating the ditch for a period of about two weeks. He presented an estimate for the labor performed, but because of the fact that he did not have any contract and had not furnished bond, the auditor of course refused to pay anything on the estimate. He then discontinued work on the job and his tools were sold recently by the sheriff on an execution against him from Ross County. The men performing labor on the ditch were not paid and they are all day laborers and need their money. The county commissioners desire to know if they can pay these laborers out of the county ditch fund."