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OFFICE OF THE ATTORNEY GENERAL OF TEXAS

AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Travis Co

Honorable M. O. Flowers
Secretary of State
Austin, Texas

Dear Sir: Att'n: Mr. Will Hann Richardson

Opinion No. O-2536
Re: Computation of filing fee, under Article 3914, for the renewal of a foreign permit with respect to the terms "the gross assets employed in whole or in part in intrastate business in Texas" and "the gross receipts from intrastate Texas business".

Your letter of recent date states that the American Republics Corporation, a Delaware Corporation, has a permit to do business in Texas and is seeking a renewal of such permit. You further state that this corporation is a holding corporation and holds stock in various corporations, Texas and foreign, doing a part or all of their business in Texas. In connection therewith you propound the following questions:

Whether in the computation of the filing fee incident thereto under Article 3914, Revised Civil Statutes of Texas, (1) the ownership of stock by this foreign holding corporation in Texas corporations doing business in Texas, and in foreign corporations doing business in Texas, are to be considered as "gross assets employed in whole or in part in intrastate business in Texas; and (2) whether the income or dividends paid by such corporations to the American Republics Corporation are to be considered as "gross receipts from intrastate Texas business".

The pertinent provisions of Article 3914 provide as follows:

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NO COMMUNICATION IS TO BE CONSTRUED AS A DEPARTMENTAL OPINION UNLESS APPROVED BY THE ATTORNEY GENERAL OR FIRST ASSISTANT

"Upon obtaining a permit under Article 1529 and upon filing a certified copy of any amendment or supplement under Article 1537, each foreign corporation shall pay the following fees for the privilege of being admitted to do an intrastate business in this State: Fifty ($50.00) Dollars for the first Ten Thousand ($10,000.00) Dollars of its issued capital stock employed in Texas, as hereinafter determined, and Ten ($10.00) Dollars for each additional Ten Thousand ($10,000.00) Dollars or fractional part thereof. The amount of the issued capital stock so taxable shall be that proportion of the whole thereof, as the gross assets employed in whole or in part in intrastate business in Texas, plus the gross receipts from intrastate Texas business, bear to the entire assets and receipts of the corporation * * * ."

We are not concerned with the question of whether the American Republics Corporation has transacted, or is transacting, or will transact intrastate business in Texas inasmuch as the corporation has had a permit to do so and is applying for a renewal permit to do so, the granting of which by the State will confer upon the corporation such right and privilege without qualification or restriction. The question before us therefore becomes merely the determination of such of its assets and such of its receipts as may properly be considered in computing the renewal filing fee under the formula set out in Article 5914.

We point out, as later discussed more fully, that the fee imposed by Article 5914 is in the nature of an entrance or admission fee - it is not a tax upon the property of the corporation.

We do not regard the physical location or the situs of the stock certificates, or the domicile of the American Republics Corporation, as controlling. NATIONAL LEATHER CO. v. MASSACHUSETTS, 277 U.S. 415. Nor do we think it can be gainsaid that the capital stock owned by the American Republics Corporation in other corporations

represents its "assets". BARRIE v. UNITED RAILWAY CO., 138 Mo. Appeals 557, 119 S.W. 1020, 1056. And that the income or dividends received from the stock so owned constitute "receipts" of the corporation.

In the purchase of stock in other corporations the holding corporation employs its capital in the precise way contemplated by the incorporators. Where a corporation thus devotes its capital stock to the very purpose for which it was formed, it will hardly do to say that such stock is not employed. WACLARK REALTY CO. v. WILLIAMS, 198 N.Y. 54, 91 N.E. 266, 48 L.R.A. (New Series) 371.

> "Acts in conformity to, and in furtherance of the sole business purpose of a going concern undoubtedly represent 'doing business' . . . ." Appeal of Gallery, 278 p. 255, 116 Atl. 222.

The case of MANHATTAN SILK CO. v. MILLER, 125 Appellate Division 296, 109 N.Y. Supp. 966, affirmed 197 N.Y. 577, 91 N.E. 1119, involved a statute subjecting to a license tax every foreign corporation doing business in the State, to be computed upon the basis of the capital stock employed by it within the state, and further providing that the capital of a corporation invested in the stock of another corporation should be deemed to be assets located where the physical property represented by such stock was located. It was held that in determining the amount of license tax to be paid by a foreign corporation doing business within the State, one of the purposes of which was to hold the stock of a domestic corporation, money invested by it in the stock of the domestic corporation could be included. The court declared in its opinion:

> "The relator complains that the money invested in the stock of other corporations was not taxable, but was simply an investment. Inasmuch as this was one of the purposes of the corporation, however, we have held that such an investment is taxable. North American Company v. Miller, 90 Appellate Div. 550, 86 N.Y.

> supp. 386, affirmed 182 N.Y. 521, 74 N.E. 1124. It is further contended, inasmuch as this company was not doing business for a profit, that the capital was not employed within the state. That contention is not good here because they were doing business for a profit. They took their profit through their dividends in the corporation in which they held the stock * * * ."

Invoking this same principle, Mr. Justice Holmes points out in EDWARDS v. CHILE COPPER CO., 270 U.S. 452, 46 S. Ct. 343, 70 L. Ed. 678:

> "If the corporation was one which congress has power to tax in this way, it is hard to say that it is not within the taxing act. It was organized for profit and was doing what it principally was organized to do in order to realize profit (to hold stock in another corporation). The cases must be exceptional when such activities of such corporation do not amount to doing business in the sense of the statute. The exemption 'when not engaged in business' ordinarily would seem pretty nearly equivalent to when not pursuing the end for which the corporation was organized, in the cases where the end is profit * * * . <u>There was some suggestion that there was only one business and therefore ought to be only one tax.</u> But if the one business could not be carried on without two corporations taking part in it, each must pay, by the plain words of the act * * * ." (Parenthetical insertion and emphasis ours).

In NATIONAL LEATHER CO. v. MASSACHUSETTS, 277 U. S. 413, 72 L. Ed., 935, 48 S. Ct. 534, there was involved a law of Massachusetts which imposed an excise on foreign corporations for the privilege of carrying on or doing business in the State, at a fixed rate per $1,000.00 upon such proportion of the fair cash value of all the shares constituting the capital stock of the corporation, as the value of the assets, real and personal, employed in business within the State bears to the value of its total

assets. The National Leather Company was a Maine Corporation engaged in the business of purchasing hides and skins, having them tanned by other companies and selling the leather through the tanners. It operated no tanneries itself. The business of the company was conducted wholly in Massachusetts and among other properties it owned the entire capital stock, except a few qualifying shares, of two other Maine Corporations which tanned leather for the National Leather Company. One of the companies, in addition to its principal business in Massachusetts, was qualified to do business and had selling branches in four or five other states; the second company being engaged in business only in Massachusetts.

The tax commissioner included all the capital stock of the two subsidiary companies as part of the assets employed by the National Leather Company in business within Massachusetts. The National Leather Company contended that the inclusion of these stocks as part of the assets employed by it in business in Massachusetts was unlawful as being in effect the imposition of a tax upon the stocks themselves, that these stocks, as distinguished from the assets of the subsidiary corporations, had no situs in Massachusetts and were not within its jurisdiction, and that the statute, so applied, was beyond the power of the State and violated the due process clause of the Fourteenth Amendment to the United States Constitution.

Mr. Justice Sanford, in delivering the opinion of the United States Supreme Court, declared:

> "For present purposes it may be assumed that the capital stocks of the two subsidiary companies had no situs in Massachusetts which brought them within the jurisdiction of that State for the purpose of imposing a direct property tax. * * * . But here the statute does not impose any direct tax upon these stocks and, as construed by the Massachusetts court, merely treats them as assets employed by the petitioner in its business within the State, and therefore requires that they be included when the total assets so employed by it are

computed for the purpose of arriving at the proportionate part of the value of its own capital shares - determined by comparing the assets employed in business within the State with the total assets wheresoever employed or located - on which the excise for the privilege of carrying on its business within the state is imposed. * * * .

"Here both the commissioner, the administrative officer charged with the enforcement of the statute, and the Massachusetts Court have found that the capital stocks of the two subsidiary companies were employed by the petitioner in carrying on its business within Massachusetts. We find no adequate reason for disturbing this conclusion. On the contrary, looking to the substance of the transactions and not merely to form, we think that the petitioner, through its ownership of the capital stocks of the two subsidiary corporations and the control which it thereby exercised over them, did, in a very real and practical sense, employ these stocks as an instrumentality in carrying on its business within Massachusetts - to the extent, at least, that the controlled activities and property of the subsidiary corporations were within the state. * * * ."

It must be recognized in this connection that the fee imposed by Article 3914 is in the nature of an entrance fee - it is not a tax upon the property of the corporation. This important distinction is recognized by the United States Supreme Court in the case of ATLANTIC REFINING CO. v. VIRGINIA, 302 U. S. 22, 82 L. Ed. 34, 58 S. Ct. 75, wherein Mr. Justice Brandeis in deliving the opinion of the court, declared:

"It is contended that a statute which measures the entrace fee solely by the authorized capital deprives the corporation of its property without due process, because the amount is determined by reference to property beyond the taxing jurisdiction; and also that this charge is an arbitrary taking of property. As has been shown, the amount of the entrance fee is not measured by property, either within or without the jurisdic-

tion; and it is not a tax upon property. It is payment for an opportunity granted..* * *. The value of the privilege acquired is obviously dependent upon the financial resources of the corporation - not only upon the capital possessed at the time of its admission to do business, but also upon the capital which it will be in a position to secure later through its existing authority to issue additional stock. Obviously, the power inherent in the possession of large financial resources is not dependent upon, or confined to, the place where the assets are located. * * * Great power may be exerted by the company in Virginia although it has little property located there. And the value to it of the privilege to exert that power is not necessarily measured by the amount of the property located or by the amount of the local business done, in Virginia. Moreover, it is immaterial whether the opportunity is availed of or not. The state grants a large privilege. It may demand a corresponding price. * * * ."

"The difference in the powers of a state over entrance fees and taxes was pointed out in Hanover Fire Ins. Co. v. Harding, 272 U.S. 494, 510, 511: 'in subjecting a law of the state which imposes a charge upon foreign corporations to the test whether such a charge violates the equal protection clause of the Fourteenth Amendment, a line has to be drawn between the burden imposed by the state for the license or privilege to do business in the state, and the tax burden which, having secured the right to do business, the foreign corporation must share with all the corporations and other taxpayers of the state. With respect to the admission fee, so to speak, which the foreign corporation must pay, to become a quasi citizen of the state and entitled to equal privileges with citizens of the State, the measure of the burden is in the discretion of the state . * *'".

Finally, it is pointed out in this case in reply to the contention that a fee measured solely by the amount

of the corporations authorized capital stock necessarily burdens interstate commerce:

> "Authorized capital has no necessary relation to the property actually owned or used by the corporation; furthermore, the fee for which it is the measure represents simply the privilege of doing a local business. Because the entrance fee does not represent either property or business being done, it is immaterial that in fixing its amount no apportionment is made between the property owned or the business done within the state and that owned or done elsewhere."

The same distinction is recognized in the case of INTERNATIONAL SHOE CO. v. SHAFFEL, 279 U.S. 439, 73 L. Ed. 731, 49 S. Ct. 380, wherein it is declared:

> "The assignment to the shares of a value in excess of their present worth or of a present value of the assets within the state does not operate to tax property or business without the state. The tax is a privilege and not a property tax. * * * ."

The Supreme Court in the case of FORD MOTOR CO. v. BEAUCHAMP 84 L. Ed. 250 (decided Dec. 11, 1939) declared through Mr. Justice Reed:

> "For this reason it is held that an entrance fee may be properly measured by capital wherever located. The weight, in determining the value of the intrastate privilege, given the property beyond the state boundaries is but a recognition of the very real effect its existence has upon the value of the privilege granted within the taxing state."

We recognize, of course, that ownership of stock by a corporation in another corporation transacting intrastate business in Texas may be of such a character as not to constitute the doing of intrastate business within Texas by the holding corporation. This goes, however, to the necessity of the holding corporation having a permit from the state and is obviated by the application

for and the receipt of a permit to do business in Texas by the holding corporation. We can only assume, therefore, that the American Republics Corporation, since it has applied for and will receive the state's permit, will employ all of its assets, to-wit, stock in domestic and foreign corporations operating in Texas, in the manner authorized by the permit it has applied for and will receive. As said by Mr. Justice Brandeis in the Atlantic Refining Company case, supra:

> " * * * . Moreover, it is immaterial whether the opportunity is availed of or not. The state grants a large privilege. It may demand a corresponding price. * * * ."

It is therefore the considered opinion of this department that in the computation of the filing fee under Article 3914, incident to the application of the American Republics Corporation for a permit to transact business in Texas, the stocks owned and held by the corporation in Texas corporations doing business in Texas, and in foreign corporations doing business in Texas, attributable to that part of their business and property in Texas, may be considered as "gross assets employed in whole or in part in intrastate business in Texas" by the American Republics Corporation.

Likewise, the income or dividends paid to the American Republics Corporation by these corporations, attributable to that part of their business transacted in Texas, may be considered as "gross receipts from intrastate Texas business", under Article 3914.

Yours very truly

ATTORNEY GENERAL OF TEXAS

By Zollie C. Steakley
Zollie C. Steakley
Assistant

APPROVED SEP 6, 1940

Gerald C. Mann
ATTORNEY GENERAL OF TEXAS

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THIS OPINION CONSIDERED AND APPROVED IN LIMITED CONFERENCE