FRANCHISE TAX: (1) Right of domestic corporation to allocate portion of capital outstate depends upon facts. (2) Goods sold on consignment are not employed in business in foreign state so that capital so tied up can be allocated.

March 22, 1940

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Hon. Clarence Evans, Chairman,
State Tax Commission,
Jefferson City, Missouri.

Dear Sir:

This will acknowledge receipt of your letter of March 2, 1940, which is as follows:

"Will you kindly furnish the State Tax Commission an opinion concerning the following matter?

Is a Missouri corporation, whose only place of business is in the State of Missouri having tangible property located without the State of Missouri, entitled to allocate such property outstate in making a return for corporation franchise tax due the State of Missouri?

Is merchandise shipped by such corporation on consignment to other states where they have no branch office exempt from the corporation franchise tax?"

Section 4641 R. S. Mo. 1929 provides for the payment of a franchise tax by a domestic corporation based upon its outstanding capital stock and surplus. The statutes then provides:

"If such corporation employs a part of its capital stock in business in another state or country, then such corporation shall pay an annual franchise tax equal to one-twentieth of one per cent of its outstanding capital stock and surplus employed in this state, and for the purposes of this article such corporation shall be deemed

> to have employed in this state that proportion of its entire outstanding capital stock and surplus that its property and assets in this state bears to all its property and assets wherever located."

In order for a domestic corporation to compute its franchise tax upon the basis provided for in the above quoted portion of Section 4641 it must "employ a part of its capital stock in business in another state or country". Thus, the answer to the first question turns on whether the ownership of property without the state by a domestic corporation is employing a part of its capital in business outside the state.

The tax imposed is not levied upon the property, "but upon the right of the corporation to transact business in this state". State v. State Tax Commission, 221 S. W. l. c. 722 (Mo. Sup.). Or, as stated at l. c. 726 of that case, "a franchise tax is not one levied upon property, but one placed on the right to do business".

In State v. Freehold Investment Co.,264 S. W. l. c. 705 (Mo. Sup.) franchise tax is classed as, "a tax imposed on corporations for the privilege of doing business in this state".

In Kaiser Land and Fruit Co. v. Curry, 103 Pac. l. c. 344 (Cal.) it is made clear that as respects a domestic corporation the tax is upon the <u>right</u> to do business as a corporation and not upon the doing of business, as is the tax on a foreign corporation. The act under consideration there was similar to Section 4641 R. S. Mo. 1929 and we think said section is susceptible to the same construction and has been so construed by the courts in the cases heretofore cited.

Further, in State v. Freehold Investment Co., supra, l. c. 705, it is pointed out that "the tax is not upon the capital stock and surplus, but is merely measured thereby".

In Home Ins. Co. of N. Y. v. New York, 134 U. S. 594, 33 L. Ed. 1025, 1030, the point for determination was whether United States bonds should be excluded in computing the franchise tax due from a corporation, it having a part

of its capital invested in said bonds. The court ruled said bonds were to be included, saying:

> "This doctrine of the taxability of the franchise of a corporation without reference to the character of the property in which its capital or its deposits are invested is sustained by the judgments in Society for Savings v. Coite and Provident Institution v. Massachusetts, which were before this court at the December Term 1867. 73 U. S. 6 Wall. 594, 611."

Thus it appears that the franchise tax in Missouri on a domestic corporation is one on the naked right of the corporation to do business as such in this state, and it not being a tax upon the property of the corporation it is of no concern to the state in what manner the capital of the corporation is invested. As pointed out, the capital is not taxed but is only used to determine the value of the right to do business as a corporation in this state.

The question of whether or not certain investments in property outside the state of Missouri causes the capital so invested to be employed in business in another state is one depending upon the facts in each instance. Your opinion request presents no particular case for decision and we cannot attempt to formulate any rule that could be invoked in making this determination. However, it does appear that the nature of the outstate investment should be measured by the charter of the domestic corporation to determine if the investment is incident to the ordinary and usual business the corporation was organized to engage in and is engaged in. This was the test applied in State v. Hogan, 103 S. W. (2d) 495 (Mo. App.) to determine if a corporation was engaged in business in this state.

Your second question involves whether or not merchandise sold on consignment and shipped out of the state is capital employed by the selling corporation in business in another state so as to entitle said corporation to compute its franchise tax under the above quoted portion of Section 4641.

The exact status of a sale of goods on consignment depends on the terms of the contract of sale, but as a general rule, " 'A consignment of personal property for sale by the consignee as agent for the consignor does not change the title to the property' ". Globe Securities Co. v. Gardner Motor Co., 85 S. W. (2d) 566 (Mo. Sup.). Under this rule the title to the merchandise sold on consignment outstate by a domestic corporation is still in the consignor and is personal property owned in this state.

Republic Steel Corp. v. Atlas Housewrecking & Lbr. Corp., 113 S. W. (2d) 155 (Mo. App.) was a suit on an account, plaintiff being a foreign corporation. The defense interposed was that plaintiff, having engaged in business in this state without obtaining a license to do so, could not maintain the suit. The proof showed that plaintiff had sold defendant, a domestic corporation, some merchandise on consignment and it was this, as defendant contended, that caused plaintiff to be engaged in business in this state. The court, in ruling the point, said l. c. 158:

> "In the case at bar the pipe was shipped to the defendant upon consignment, title remaining in plaintiff and, under the contract, plaintiff had considerable control over the method of the sale of the goods. However, they were sold to defendant's customers, exclusively, plaintiff not attempting to interfere with the matter as to whom the pipe should be sold. Defendant was to be responsible for the payment of the goods sold to its customers and also for the preservation of the pipe, itself, that was shipped to it direct. Under the contract between the parties the relationship between them was that of principal and factor and such relationship without more does not make the factor such an agent of the principal that it can be said that he is conducting the business of the principal in the state where the sales take place."

Thus it appears that merely because a foreign corporation sells goods on consignment to a Missouri corporation does not cause the foreign corporation to be engaged in

business in this state. We think the converse of this is also true so that when a domestic corporation sells goods on consignment to a concern in a foreign state it is not engaged in business in such state. Not being engaged in business in such state it could not then have any of its capital employed there and consequently would not be entitled to compute its franchise tax under the above quoted portion of Section 4641.

Respectfully submitted,

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LLB:CP

APPROVED:

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