

CORPORATIONS.
FEES:
CONSTITUTIONAL LAW:

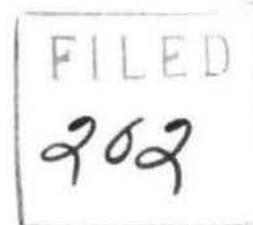
1. In accordance with subsection 5 of Section 351.585, RSMo Supp. 1967, a foreign corporation seeking to do business in Missouri can be required to pay a qualification fee to Missouri

on the value of all its property to be used in this state when the authorized par value capital of the corporation is less than the value of its property in this state. 2. Subsection 5 of Section 351.585, RSMo Supp. 1967, does not place a burden on interstate commerce which violates Article I, Section 8 of the United States Constitution.

April 15, 1970

OPINION NO. 202

Honorable Charles E. Valier
State Representative - District 69
14 North Kingshighway
St. Louis, Missouri 63108



Dear Mr. Valier:

This is to acknowledge receipt of your request for a formal opinion from this office which reads in part as follows:

"My question is, can a foreign corporation seeking to do business in Missouri be lawfully required to pay a fee to Missouri on the value of all its property to be used in Missouri when the authorized par value capital of the corporation is substantially less than the value of all its property in Missouri. If your answer to this question is yes, then my further question is, does not such a requirement because it discriminates against a foreign corporation place a burden on commerce which violates Article 1, Section 8 of the United States Constitution.

"An example can best explain the problem that arises:

"Suppose a foreign corporation with authorized par value capital of \$30,000.00 and property to be used in Missouri of a value of \$1,400,000.00 subject to any debt seeks to do business in Missouri (and only in Missouri). Under a strict interpretation of Section 351.585 (5) that corporation would be required to pay fees of \$738.00, and \$10.00 for the privilege of doing business in Missouri for a total of \$748.00. If the same corporation was

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required to pay a fee based on its authorized capital (as a like Missouri corporation would) the fee would be \$53.00 and \$10.00 for the privilege of doing business in Missouri for a total of \$63.00.

"Under a strict interpretation of the statute, a foreign corporation would pay a fee of \$748.00 and an identical Missouri corporation would pay a fee of only \$53.00."

Subsection 5 of Section 351.585, RSMo Supp. 1967, reads as follows:

"5. Such corporation shall be required to pay into the state treasury upon the proportion of its stated capital and surplus represented by its property and business in Missouri a domestication tax or fee equal to the incorporating tax or fee of corporations formed under or subject to this chapter, with an additional ten dollars as a fee for issuing said certificate of authority to do business in this state; provided, however, that the value of the proportion of the stated capital and surplus of said corporation represented by its property and business in Missouri shall, in no event, be less than the value of the corporation's property located in the state of Missouri."

We will first consider the issue as to whether a foreign corporation seeking to do business in Missouri can be required to pay a qualification fee to Missouri on the value of all its property to be used in this state when the authorized par value capital of the corporation is substantially less than the value of its property in this state.

It is well settled law that, except as a foreign corporation is engaged in interstate or foreign commerce, or is employed as an agency or instrumentality of the federal government, or is otherwise within the protection of the Constitution of the United States, a state's power to prescribe the terms and conditions upon which a foreign corporation shall be permitted to enter and carry on business is absolute. 17 W. Fletcher, Private Corporations, Section 8303 at 39 (Rv.Ed. 1960). This principal has also been followed in Missouri. See State vs. Standard Oil Co., 194 Mo. 124, 91 S.W. 1062; and, Roeder vs. Robertson, 202 Mo. 522, 100 S.W. 1086. As far as the power of the state to require payment of a qualification fee or tax, as a condition to admission into the state, it is equally clear that it is within the power of the state, provided that the

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imposition does not violate any constitutional prohibition. Hanover Fire Ins. Co. vs. Carr, 272 U.S. 494, 47 S.Ct. 179, 71 L.Ed. 372 (1926). In other words, where the federal Constitution is not violated the state may prescribe any entrance fee it desires. State vs. Crawford, 90 Fla. 264, 105 So. 446.

We will next consider the issue as to whether or not the Missouri statute places a burden on commerce which violates Article I, Section 8 of the United States Constitution. In this connection, it should be noted that there is a distinction between an admission fee and a franchise fee in that the former refers to the power of a state to enact a fee for the privilege of doing business in the state, while the latter refers to a levy for revenue purposes upon the exercise of the franchise or contract rights previously granted. St. Louis Southwestern Ry. Co. vs. Stratton, 353 Ill. 273, 187 N.E. 498, cert.den. 291 U.S. 673, 78 L.Ed. 1062, 54 S.Ct. 458 (1934). However, the governing law seems to be the same without regard to whether the imposition is an entrance fee or a franchise tax payable annually after admission into the state. 18 W. Fletcher, Private Corporations, Section 8817 at 616 (Rv.Ed. 1960).

The commerce clause of the federal Constitution prohibits a state from exacting license fees from a corporation engaged exclusively in interstate commerce. Alpha Portland Cement Co. vs. Massachusetts, 268 U.S. 203, 45 S.Ct. 477, 69 L.Ed. 916 (1925). On the other hand, license fees or franchise tax fees upon foreign corporations engaged in both intrastate and interstate commerce are generally sustained, as against objections based on the commerce clause where the taxes or entrance fees are measured by the local or intrastate business, income property, or capital. In this connection, it should be noted that subsection 5 of Section 351.585, RSMo Supp. 1967, assesses license fees upon the basis of "issued" capital stock represented by business and property in the jurisdiction.

Thus, in Western Cartridge Co. vs. Emerson, 281 U.S. 511, 50 S.Ct. 388, 74 L.Ed. 1004 (1930), a state license fee or franchise tax upon a foreign manufacturing and selling corporation, based on the proportion of the issued capital stock represented by business transacted and property located in the taxing state, was held not to be an unlawful burden on interstate commerce, as applied to a foreign manufacturing and selling corporation doing both interstate and local business within the state, having its factories and principal office therein, as well as nearly all its property. The statute in question provided for a franchise tax of five cents on each one hundred dollars of "issued" capital stock represented by business transacted and property located in the state. The court said at page 513-514:

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"The tax in question was not laid directly upon interstate commerce, or any of its elements. For the determination of the amount the taxpayer's business and property located in Illinois is divided by the total of all its business and property and that percentage is applied to the issued shares and the resulting number taken for taxation at the rate of 5 cents per \$100. As the amount depends on the relation each to the others of the various elements employed in the calculation, the fee or tax does not directly depend upon the amount of the taxpayer's interstate transactions. . . . And it is plain that, if the fee or tax in question affected petitioner's interstate or foreign commerce at all, the burden was indirect and remote and not a violation of the commerce clause."

Earlier in the case of Southern Ry. Co. vs. Watts, 260 U.S. 519, 43 S.Ct. 192, 67 L.Ed. 375 (1923), a state franchise tax upon a foreign railroad company engaged in both local and interstate business in the state for the privilege of doing intrastate business there, measured by the value of the company's property within the state, was held not to violate the commerce clause, where its payment was not made a condition precedent to the right to do interstate business.

In Southern Realty Corp. vs. McCallum, 65 F.2d 934 (1933), CCA 5th, cert.den. 290 U.S. 692, 54 S.Ct. 127, 78 L.Ed. 596 (1933), a franchise tax upon a foreign corporation for the privilege of doing business within the state based upon that proportion of the outstanding capital stock, surplus, and undivided profits, plus the amount of outstanding bonds, notes, and debentures, other than those maturing in less than one year from the date of issue, which the gross receipts from its business done within the taxing state bore to the total gross receipts of the corporation from its entire business, was held not to involve any unlawful interference with interstate commerce. The court further stated at page 936:

"That a state may impose such a franchise or business privilege tax, and may measure it by the capital stock and surplus used by the corporation in its business or by its income therefrom, although business is done in more states than one, without unconstitutional interference with interstate commerce

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or other federal prerogative and without a taxing of property beyond the jurisdiction of the taxing state, when the capital by which the tax is measured is reasonably apportioned according to the business there done, is settled by many decisions."

In Atlantic Lumber Co. vs. Commissioner of Corporations and Taxation, 298 U.S. 553, 56 S.Ct. 887, 80 L.Ed. 1328 (1936), the Supreme Court of the United States held that no unconstitutional burden was imposed upon interstate commerce by a state statute which imposed upon foreign corporations, with respect to the carrying on or doing a business within the state, a franchise tax based upon such proportion of the fair value of the capital stock of the corporation as the value of the assets employed in the state bore to the value of its total assets, as applied to a foreign wholesale lumber company carrying on both local and interstate business in the state but having in the taxing state its principal office at which it accepted orders for goods taken in the state and in other states, which were filled from sources outside the state, and in which it received payment.

Finally, in Atlantic Refining Co. vs. Commonwealth of Virginia, 302 U.S. 22, 58 S.Ct. 75, 82 L.Ed. 24 (1937), although the qualification fee was based upon the total authorized capital of a corporation rather than capital stock represented by business and property in the jurisdiction, the Supreme Court of the United States sustained the statute against objections based upon the commerce, due process and equal protection clauses of the federal Constitution. The language of the court at page 26-27 was as follows:

"As the entrance fee is not a tax, but compensation for a privilege applied for and granted, no reason appears why the State is not as free to charge \$5,000 for the privilege as it would be to charge that amount for a franchise granted to a local utility, or for a parcel of land which it owned. If Virginia had the power to charge \$5,000 for the privilege, the particular measure applied by the Legislature in arriving at that sum would seem to be legally immaterial; . . . 'The selected measure may appear to be simply a matter of convenience in computation . . . and if the tax purports to be laid upon a subject within the taxing power of the State, it is not to be condemned . . . by any artificial rule.'"

As a result of the above authorities, it is our view that subsection 5 of Section 351.585, RSMo Supp. 1967, does not violate Article I, Section 8 of the United States Constitution.

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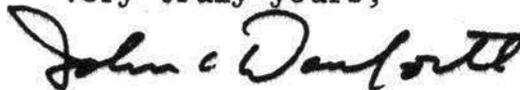
CONCLUSION

The opinion of this office is as follows:

1. In accordance with subsection 5 of Section 351.585, RSMo Supp. 1967, a foreign corporation seeking to do business in Missouri can be required to pay a qualification fee to Missouri on the value of all its property to be used in this state when the authorized par value capital of the corporation is less than the value of its property in this state.
2. Subsection 5 of Section 351.585, RSMo Supp. 1967, does not place a burden on interstate commerce which violates Article I, Section 8 of the United States Constitution.

The foregoing opinion, which I hereby approve, was prepared by my assistant, B. J. Jones.

Very truly yours,



JOHN C. DANFORTH
Attorney General