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OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GROVER SELLERS
[redacted]
ATTORNEY GENERAL

Honorable Girard Kinney
Supervisor, Agents' Licenses
Fire Insurance Department
Board of Insurance Commissioners
Austin, Texas

Dear Sir:

Opinion No. O-1997-A
Re: Opinion No. O-1997, reconsidered and approved.
Whether the Texas Retaliatory Law against the Kansas company should be applied on the total or aggregate of fees, penalties, taxes and charges rather than as fee against fee, taxes against taxes, penalties against penalties, and the like.

In your letter of June 11, addressed to the Attorney General, you request a reconsideration of our opinion No. O-1997; and in this connection you quote fully therein from a letter received by you from Honorable Robert Osborn, Assistant Commissioner of Insurance of the State of Kansas, in which he cites the case of Employers' Casualty Company v. Charles F. Hobbs, Commissioner, 149 Kan. 774, 89 P.(2d) 921, by the Supreme Court of that State, concluding as follows:

> "It is our definite feeling that the ruling as it stands (O-1997) is not a proper application of the Texas Retaliatory Law, as against the existing law in Kansas, as interpreted by the Supreme Court and the actual practice of this Department."

With reference to our opinion O-1997, we cannot agree with the interpretation placed upon it by the Assistant Commissioner of Insurance of the State of Kansas as shown in the third paragraph of his letter quoted by you. In the opinion

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in question, we assumed that such solicitors were given authority to solicit business through the recording agent duly appointed by the Kansas company or was actually soliciting business, and such business accepted by the company through its recording agent. This is apparent from the language of the opinion, which reads,

> ". . . .the Kansas companies should be charged a license fee for each agent or solicitor who holds authority to produce business for said companies."

The fact that a person is "officing with, and engaged in, soliciting insurance on behalf of a Local Recording Agent" for several companies, would not make him an agent for any one of those particular companies not accepting his business or in fact denying him authority to solicit in their behalf. A solicitor in Texas is not required to pay but one license fee, which license is secured by a company joining with its recording agent in making application therefor. We see no reason why another principal of said recording agent, being a foreign insurance company although it may not join in the application for said solicitor's license, may not be charged under the Texas Retaliatory Law with a similar or like fee imposed upon "agents" of the home state of the principal corporation upon Texas corporations in that state; it being our view that for the purpose of this law, there is no material distinction between "solicitor" in Texas and "agent" in Kansas, the controlling feature being that both are engaged in soliciting insurance on behalf of one or more of the Recording Agents' companies accepting such business.

Having therefore carefully reconsidered opinion No. O-1997 in the light of this request we are of the opinion that same is correct.

We come now to consider the addidional request raised in your letter as to the method of applying the Texas Retaliatory Law, set forth in your letter in the following language:

> "In view of the additional information contained in the Assistant Commissioner's letter, we respectfully request reconsideration of 1997, and also your advices as to whether or not this Department should apply the Texas Retaliatory Law against a Kansas Company on the total amount of fees, penalties, and taxes charged rather than in the consideration of particular items; that is,

should the Texas Retaliatory Law be applied as to fees against fees, taxes against taxes, and penalties against penalties, or should this law be considered in the aggregate of all such charges?"

Article 4758, Vernon's Annotated Civil Statutes, provides:

"Whenever, by any law in force without this State, an insurance corporation, fraternal beneficiary society or reciprocal exchange of this State or agent thereof is required to make any deposit of securities thereunder for the protection of policyholders or otherwise, or to make payment for taxes, fines, penalties, certificates of authority, valuation of policies, license fees, or otherwise, or any special burden is imposed, greater than is required by the laws of this State for similar foreign corporations or their agents, the insurance companies, fraternal beneficiary societies and reciprocal exchanges of such States or governments shall be and they are hereby required as a condition precedent to their transacting business in this State, to make a like deposit for like purposes with the State Treasurer of this State, and to pay to the Commissioner of Insurance for taxes, fines, panalties, certificates of authority, valuation of policies, license fees and otherwise a rate equal to such charges and payments imposed by the laws of such other State upon similar corporations of this State and the agents thereof. . ."

We have reviewed numerous decisions in practically every state having enacted similar legislation with reference to applying their respective retaliatory laws. A full treatise on the subject is to be found in 91 A.L.R. Annotated (795). It appears that a majority of the courts weigh such legislation as an endeavor to procure reciprocity of action on the part of the state concerned with reference to taxes and not plain retaliation, by reason of the fact that the courts are giving more consideration to the equality of the ultimate amount of tax collected by the states concerned than to the equality of the rate of taxation.

In order to provide equality which is the manifest object of the statute, it is not necessary to levy a specific tax to meet a similar tax levied by another state, but, if the aggregate of the taxes collected from a foreign insurance company in the retaliating state equals the tax imposed on

foreign insurance companies by the state in which the taxed company is incorporated, the object of the law has been attained. Life & Casualty Insurance Company of Tennessee v. Coleman, 25 S. W. (2d) 748.

In State v. Reinsund, 45 Ohio State 214, 13 N. E. 30, the Supreme Court of the State of Ohio, discussing the reciprocal and retaliatory statute of that state, held that the superintendent of insurance had performed his whole duty when he required companies organized out of Ohio to pay a sum sufficient to make the total equal to the amount that would be realized, were the rule of taxation of the foreign state, under whose laws the foreign company was organized, applied to such foreign company's business transacted in Ohio.

In Cochrane v. Bankers' Life Company, 30 P. (2d) 918, involving the Colorado State Retaliatory Law, the court points out that retaliatory statutes are intended to level the amount of taxes, and not, as penal statutes, to require the payment of an equal rate of taxation as a penalty.

In viewing the Kansas statute upon which the decision in Employers' Casualty Company v. Hobbs, 149 Kan. 774, 89 Pac. (2d) 923, is based, we find a retaliatory law substantially the same as the Texas law, Article 4758, supra. The only distinction is to be found in the language of the two statutes which, in Texas, requires such foreign insurance companies as a condition precedent to their transacting business in this State, "to pay to the Commissioner of Insurance for taxes, fines, penalties, certificates of authority, valuation of policies license fees and otherwise a rate equal to such charges and payments imposed by the laws of such other State upon similar corporations of this State and the agents thereof," while the Kansas Statutes, G. S. 1935, 40-253, in lieu of this language provides that such company shall "pay to the Commissioner of Insurance of this State for taxes, fines, penalties, certificates of authority, licenses, fees, compensation for examination, or otherwise, an amount equal to the amount of such charges and payments . . ." We are inclined to view the word "rate" as used in the Texas Statute, meaning "assessment", as predisposing some basis of calculations by which the "amount" of tax can be determined, and in this sense, when applied to taxes, the ultimate result in applying either the Texas or Kansas law would be the same. We cannot say, however, that in arriving at equality in the matter of taxes imposed items for items are not to be considered as a basis for assessment under the Texas Retaliatory Law. However, the aggregate of such fine, penalties, taxes, and other charges or payments imposed by the state retaliated against should be taken in applying the Texas Retaliatory Law.

APPROVED OPINION COMMITTEE
BY BWB, CHAIRMAN

The Supreme Court of Kansas in Employers' Casualty Company v. Hobbs, supra, seems to have settled the question here presented to this Department. The court in that case was primarily concerned with three separate charges or fees imposed by the laws of Texas on foreign insurance corporations doing business in Texas, which were assessed against the casualty company, a Texas corporation doing business in Kansas under the Kansas Retaliatory Law. It was pointed out that the Kansas statutes made no specific provision for such items. The court, quoting at length from the Kentucky case, Life & Casualty Insurance Co. v. Coleman, supra, and holding that the word "amount" referred to all exactions under whatever name and in the aggregate, stated in its opinion, and we quote:

> ". . .And we think it clear, both from the standpoint of the end sought to be accomplished by the statute, and the grammatical structure of the statute, that it was never intended there should be a comparison as between the statutory requirements of this state and of the state in which the foreign corporation is chartered so that a particular tax should be measured against a like tax in the other state, a particular fee measured against a like fee, etc.; nor that taxes should be aggregated and measured against aggregated taxes of the other state, fees aggregated and measured against aggregated fees, etc. To so hold would compel us to ignore the phrase 'or otherwise' twice used in the statute, for it in and of itself contemplates exactions not included in those specified. . ."

The object and intent of a statute is always to be regarded; and, of course, its language is to be understood and construed as furthering the objects contemplated by the makers. There being no material distinction between the language of the Texas statute and the Kansas statute, the decision of the Kansas Supreme Court in Employers' Casualty Company v. Hobbs, supra, would be controlling in applying the Texas Retaliatory Law.

Answering the second part of your request, therefore, you are respectfully advised that it is the opinion of this Department that the aggregate of all taxes, fines, penalties, fees and other charges imposed by the State of Kansas on a Texas corporation operating within its borders should be considered in applying the Retaliatory provisions of the Texas law, Article 4758, Vernon's Annotated Civil Statutes, against a like Kansas corporation doing the same amount and volume of business in Texas as the Texas company did in Kansas.

Yours very truly
ATTORNEY GENERAL OF TEXAS

BY (signed) Wm J. R. King, Assistant

APPROVED JUL 11 1940
Grover Sellers
First Assistant