GROSS INCOME TAX DIVISION: Where several corporations operate several stores separately, but entire voting stock is under single control of another corporation, stores should be licensed as other chain stores under single ownership.

December 14, 1939.

Hon. Norman W. Gordon, Administrator,
Store License Division,
141 S. Meridian Street,
Indianapolis, Indiana.

Dear Sir:

I have before me your letter requesting an opinion interpreting section 7 of the Store License Act of 1929, the same being Burns Indiana Statutes Annotated (1933), section 42-307. This section reads as follows:

> "The provisions of this act shall be construed to apply to every person, firm, corporation, copartnership or association, either domestic or foreign, which is controlled or held with others by majority stock ownership or ultimately controlled or directed by one (1) management or association of ultimate management."

In order to arrive at a correct construction of the above section, it is necessary to have a general view of the Act of which it forms a part. The title of the Act is:

> "An Act requiring licenses for the operation, maintenance, opening or establishment of stores in this state, prescribing the license and filing fees to be paid therefor, and the disposition thereof, and the powers and duties of the state board of tax commissioners in connection therewith, and prescribing penalties for the violation thereof."
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> Acts of 1929, page 693.

The first section of the Act (which has not since been amended) makes it unlawful for "any person, firm, corporation, association or copartnership, either foreign or domestic, to operate, maintain, open or establish any store in this state without first having obtained a license so to do from the state board of tax commissioners."

> Burns Indiana Statutes Annotated (1933), Section 42301.

The second section provides for the making of an application for a license.

Burns Indiana Statutes Annotated (1933), Section 42-302.

The third section requires the State Board of Tax Commissioners to examine the application, and if found to be correct and the proper fees are paid, a license is thereupon issued.

Burns Indiana Statutes Annotated (1933), Section 42-303.

The fourth section (which has been amended upon two different occasions) makes provision for license renewals.

Burns Indiana Statutes Annotated (1933), Cumulative Pocket Supplement, June 1939, Section 42-304.

The fifth section (which has also been amended) provides a graduated scale of license fees which are to be paid. Illustrating the method of graduation, it will be sufficient to point out that upon one store the annual license fee is $3.00; upon two stores or more, but not to exceed five stores, the annual license fee is $10.00 for each such additional store, and so on, the largest annual license fee being $150.00 for each additional store in excess of twenty. The validity of such a graduated scale has been upheld by the Supreme Court of the United States and by the Supreme Court of Indiana.

State Board of Tax Commissioners of Indiana v. Jackson, 283 U. S. 527;

Midwestern Petroleum Corporation v. State Board of Tax Commissioners, 206 Ind. 688.

The opening sentence of section 5 is as follows:

> "Every person, firm, corporation, association or copartnership opening, establishing, operating or maintaining one (1) or more stores or mercantile establishments, within this state, under the same general management, supervision or ownership, shall pay the license fees hereinafter prescribed for the privilege of opening, establishing, operating or maintaining such stores or mercantile establishments."

Burns Indiana Statutes Annotated (1933), section 42-305.

Section 6 of the Act (which has been amended) makes special provision for the collection of the tax or license fee.

> Burns Indiana Statutes Annotated (1933), Cumulative Pocket Supplement, June 1939, section 42-306.

Thereafter follows section 7 which has already been quoted. It requires only superficial view of the language of the Act to disclose the purpose and the intent of the legislature to require the payment of a license fee for the opening, establishing, operating or maintaining of a store and to increase the fee substantially for the opening, establishing, operating or maintaining of additional stores by the same person or by the same general management. It is obvious, too, that to sustain such a classification the legislature was probably required, and whether so required or not, actually did look beyond superficial appearances and placed in the same class all those who were ultimately controlled or directed by one management or association of ultimate management. This seems to have been the purpose and intent of section 7, and the only thing left for determination is as to whether the language used by the legislature will bear such a construction.

The type of ultimate control by one management in the illustration given by you and upon which I am to base my opinion is the type where several corporations are organized for the purpose of operating several stores in which, however, the entire voting stock of such stores is held by another single corporation. Objection has been made that the literal language of section 7 provides that the provisions of the Act shall be construed to apply to these several corporate entities whose entire voting stock is held by a single other corporation rather than to such other single corporation. In other words, that the language of section 7 literally makes the provision of the Act apply to the controlled units rather than to the single unit controlling them, and that apparently is true if the language of the section is to be literally construed. That fact, however, if it be a fact, does not make the state powerless to reach a class of stores operated as disclosed in your illustration to the same extent as if all of them were operated under the same corporate name or by the same individual. The purpose of section 7 clearly was to forestall an escape from the tax where the stores were operated substantially similar to stores being operated by

the same individual or corporation, and to meet the objection made by the controlling holding company that it, as a corporation, was not engaged in the operation of any stores. If, however, it held the entire voting stock in all of them, even though such stores had separate officers and boards of directors they would nevertheless be under a single controlling power represented by a single owner of their entire voting stock. It seems to me that notwithstanding the fact that section 7 literally makes the provisions of the Act applicable to the controlled rather than the controller is of no particular significance, except perhaps in the method to be employed to collect the tax.

In my opinion, if the stores are ultimately controlled by the same corporate entity through a majority stock ownership they would not be authorized to operate without having obtained a license and without having paid the fees as required by the Act in case of multiple stores owned or controlled by a single ownership. While the precise question has not been before any court of last resort so far as I have been able to discover, it has been held that the operation of filling stations by refining companies, pursuant to a lease arrangement with so-called "authorized licensed dealers," should be considered as operation of such filling stations by the refining company where it reserved control over the method of doing business by such outlets for its product.

Gulf Refining Company v. Fox, Tax Commissioner, 297 U. S. 381;
See also Bedford v. Gamble-Skogmo, Inc., 91 Pac. (2nd), p. 475.

In the illustration given by you it is claimed by the stock owning company that the purpose of the arrangement is to furnish adequate capital to promising retailers of the company's product until such time as such retailer can adequately finance himself. However, I do not think that makes any difference since the fact remains that all of these several stores are controlled by one company through its ownership of the entire voting stock of each of the operating companies. It seems to me that they come clearly within the statute and should be treated as a group under a single control and that the appropriate fees should be applied accordingly.