Opinion No. 57-189

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BY: OPINION OF FRED M. STANDLEY, Attorney General Joel B. Burr, Jr., Assistant Attorney General

TO: John Block, Jr., Chairman, State Corporation Commissioner, Santa Fe, New Mexico

QUESTIONS

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1. May a franchise tax be assessed against Federal Savings and Loan Associations?

2. May deposits of federal chartered savings and loan associations and state chartered building and loan associations be taxed as paid in capital?

CONCLUSIONS

1. Yes.

2. Yes.

OPINION

ANALYSIS

Section 51-13-5 N.M.S.A., 1953 Compilation contains the following language:

". . . Purely mutual building and loan associations, substantially all of the business of which is confined to making loans to members, shall be taxed at the rate of twenty-five cents for each one thousand ($ 1,000.00) dollars of their paid in capital, legal reserve, undivided profits and surplus."

Federal Savings and Loan Associations are chartered by the federal government under the provisions of the Home Owners' Loan Act of 1933, 12 U.S.C.A., §§ 1461-1468. For purposes of this opinion, it will be conceded that federal savings and loan associations are instrumentalities of the federal government for the purposes of lending their money to relieve financially distressed owners of farms and homes pursuant to the provisions of the Home Owners' Loan Act of 1933.

It is a well recognized principle of constitutional law that the state may not impose taxes upon the assets or property of any agency or branch of the federal government, with the exception of real property, without the consent of Congress. McCulloch v. State of

Maryland, 17 U.S. 316, 4 L. Ed. 579. We must then proceed to ascertain whether Congress has consented to state taxation of the assets and personal property of federal savings and loan associations. The answer, we feel, is contained in language found in 12 U.S.C.A. § 1464 (h) of the Home Owners' Loan Act of 1933, and reads as follows:

"Such associations, including their franchises, capital, reserves, and surplus, and their loans and income, shall be exempt from all taxation now or hereafter imposed by the United States (except the taxes imposed by sections 1410 and 1600 of Title 26 with respect to wages paid after December 31, 1939, for employment after such date and except, in the case of taxable years beginning after December 31, 1951, income, warprofits, and excess-profits taxes), and all shares of such associations shall be exempt both as to their value and the income therefrom from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States; **and no State, Territorial, county, municipal, or local taxing authority shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions."**

We are informed that state chartered building and loan associations are being assessed a franchise tax at the present time, and that the basis of computation for the amount of tax to be paid will be the same for both federal and state associations.

Inasmuch as Congress has consented to the State's taxing such associations so long as the tax is not discriminatory, and the tax proposed to be assessed by the state will not be greater than that imposed on similar local associations we conclude that the federal savings and loan associations fall within the classification of purely mutual building and loan associations, substantially all of the business of which is confined to making loans to members, and are, therefore, subject to the franchise tax imposed by § 51-13-5, N.M.S.A., 1953 Compilation.

Our position is not without authority. Exhaustive research has revealed only one case directly in point. That was the case of First Federal Savings & Loan Association of Altadena v. Johnson, 122 P. 2d 84. That case involved the question of whether a state could impose a franchise tax on a federal savings and loan association. The court answered the question in the affirmative and in interpreting subdivision (h) of § 1464 of the Home Owners' Loan Act, quoted earlier in this opinion, said the following:

"Although the language of sub-division (h) of section 1464, with respect to state taxation of federal agencies is negative in form, its meaning is clear and unambiguous. We are of the opinion it constitutes federal authority for states to levy and collect franchise taxes from Federal Savings and Loan Associations, as agencies of the United States Government doing business within such states, based upon their net incomes, provided the rate is not greater than that which is imposed upon other similar local mutual or cooperative thrift and home-financing institutions."

We feel the above decision is sound in principal and extremely persuasive in the absence of a court decision to the contrary.

Having determined that federal savings and loan associations are subject to the payment of franchise taxes, we turn to the question of whether the deposits paid in by the members of said corporations constitute "capital" of the corporation and are thus subject to a franchise tax as provided in § 51-13-5, N.M.S.A., 1953 Compilation.

This precise question has never been the subject of litigation in the Supreme Court of this State. However, the case of The Territory of New Mexico v. The Cooperative Building & Loan Association of Albuquerque, 10 N.M. 22, discusses the peculiar character of mutual building and loan associations and their capital stock, and for that reason is helpful. That case involved the question of whether capital stock and mortgages owned by the corporation were subject to taxation by the courts. The Court held that neither the shares of stock nor mortgage to secure loans of such corporations were exempt from taxation in the territory. That Sections 4018 and 4019 C L 1897 required all property to be taxed unless exempt. And that any statute upon which a claim to relief is based on any property from its due proportion of the general burden of government should be so clear that there can be no reasonable doubt nor controversy about the terms. The Court quoted the following statement from Cooley on Taxation:

"Exemption from taxation must be expressed in the clearest and most unambiguous language and not left to implication or inference." (Cooley on Taxation, Sections 69, 70 and 205.)

The Court quoted further from Yazoo and M. V. R. Co. v. Thomas, 132 U.S. 174:

'Exemptions from taxation are regarded in derrogation of the sovereign and of the common right, and therefore not to be extended beyond the exact and express requirements of the language used strictissimi juris."

Applying these rules to the question at hand we find that the Legislature specifically provided that purely mutual building and loan associations were to be assessed a franchise tax at the rate of twenty-five cents per thousand dollars of their paid-in capital, legal reserves, undivided profits and surplus. (See § 51-13-5, N.M.S.A., 1953 Comp.) The capital account of both federal and state chartered mutual building and loan associations consists of deposits of its members. It is contended that these deposits cannot be properly classified as capital of the corporation, but instead give rise to a debtor-creditor relationship and are therefore analogous to a bank deposit. It is, therefore, contended that inasmuch as these deposits do not represent true capital, they are not subject to a franchise tax.

We, however, cannot concur in this position. First of all, the only assets of such a corporation that can be considered as falling within a capital account are the deposits or investments of its individual stockholders. We must assume that the Legislature was

well aware of the capital structure of a mutual building and loan association when it adopted the wording used in the statute.

It is material to note at this point that all corporations other than mutual building and loan associations are assessed a higher franchise tax (See § 51-13-2 N.M.S.A., 1953 Comp.). It is not unreasonable to assume that the Legislature's action in assessing a lower tax on mutual building and loan associations than was imposed on other corporations was because of the Legislature's awareness of the peculiar nature of these organizations.

That deposits of members of such organizations are to be considered capital for the purposes of assessing a franchise tax on the basis of the amount of capital stock of the corporation was decided in the affirmative in State v. Guaranty Savings and Loan Association, 225 Ala. 481, 144 So. 104. In that case Defendants contended that because all sums paid in by its members on account of their shares were with-drawable at the will of the members owning the shares upon sixty days notice, such stock ownership was not of "capital stock" within the meaning of a constitutional provision assessing a franchise tax on all corporations based on the amount of capital stock. The Court in refuting this argument said that the fact that shareholders in building and loan associations could on sixty days notice withdraw funds contributed was not decisive of the shareholder's status as stockholders or creditors. That such fact was only one circumstance to be considered in determining the question, which was properly answered by determining whether other usual elements and attributes of stock ownership existed.

The Court discussed the relationship between the corporation and the depositor and concluded that the latter was a stockholder and that the stock issued was capital stock subject to a franchise tax based thereon.

We feel the test applied in the above case in determining whether deposits of members of such organizations are to be considered capital for purposes of assessing a franchise tax thereon is both logical and correct. As outlined above, such a test would take into consideration whether or not the usual elements and attributes of stock ownership are present in the ownership of mutual building and loan association stock. Applying this test to both state and federal chartered associations, we note that both issue stock to their depositors in proportion to the amount of their deposit. The stock received in evidence of ownership in the corporation and carries voting rights. It therefore follows that the depositors or stockholders determine the policy to be followed by the corporation in that they elect the board of directors who manage the organization. No set interest rate is agreed on prior to the deposit, but instead dividends are paid the stock holders based on profits realized by the corporation. In case of liquidation, the depositors or stockholders are not on an equal footing with the general creditors of the corporation. The latter are entitled to be paid first, with the depositors sharing equally on anything that might be left. All these elements are the usual ones found present in stock ownership, and are completely foreign to the debtor-creditor relationship created by a bank deposit. The fact that the depositor is given the right to withdraw his deposits at

will upon giving reasonable notice is the only element present in the transaction which is analogous to a debtor-creditor relationship such as may be found in a bank deposit.

In view of the above considerations, and in view of the rule stated by our Supreme Court in Territory of New Mexico v. The Co-operative Building & Loan Association of Albuquerque, supra, that exemption from taxation must be expressed in the clearest and most unambiguous language with nothing left to implication or inference, we are constrained to hold that depositors in a mutual building and loan association are in effect stock holders of said associations, and that the funds deposited are capital of the corporation as was contemplated by § 51-13-5, N.M.S.A., 1953 Comp., and thus subject to a franchise tax.

In accord with this view are numerous textwriters who classify mutual building and loan associations as corporations whose capital structure is of the same nature as that of other corporations for taxation under constitutional or statutory equality. (See Thompson on Building Associations, § 329, Endlick on Building Associations, § 495, State ex rel Morgan v. Workingmen's B. & L. F. & S. Association, 152 Ind. 278, 53 N.E. 168.).

In adopting this conclusion, we are not unaware of other cases which hold that the relationship created is one of debtor-creditor. However, after a careful and thorough study of the subject, we conclude that the authorities upon which this opinion is based are sound in principle and more realistic in viewpoint.

In conclusion we hold that Federal Savings and Loan Associations are subject to the payment of a franchise tax, and that deposits of both state and federal chartered organizations should be taxed as paid-in capital.