

Opinion No. 63-30

April 5, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

TO: Mr. Jesse D. Kornegay Chief State Tax Commission State Capitol Building Santa Fe, New Mexico

QUESTION

QUESTIONS

1. Which of the two attached forms (designated number 1 and 2) comply with the requirements of Section 72-6-6, N.M.S.A., 1953 Compilation?
2. If you decide that form number 1 does not meet the requirements of the above statute, can the State Tax Commission impose an additional assessment upon each bank for the under-valuation caused by the form, of any years prior to 1963?

CONCLUSIONS\$

1. Form No. 1 does not meet the requirements of the statute; Form No. 2 does.
2. No.

OPINION

{*61} ANALYSIS

Section 72-6-6, N.M.S.A., 1953 Compilation sets forth the formula for valuing shares of stock of banks for taxation purposes. The formula as set forth therein requires that from the total of capital stock, surplus, reserve for contingencies and undivided profits there shall be deducted real estate to the extent of its assessed value, surplus equal to capital and Reserve for Contingencies equal to capital with the resulting total being the net valuation of the shares.

Apparently, however, for some period of time the Commission has used form number 1 which allows a deduction for undivided profits equal to capital in addition to those set forth above. This plainly is not contemplated nor permitted by the Statute. The use of form number 1 therefore has over the years resulted in an under-valuation of the net valuation of the shares of stock for banks to the extent of the unauthorized deduction for undivided profits.

An examination of form 2 reveals that it does not allow this unauthorized deduction and therefore is the form that should hence forth be used by the Commission. It conforms with the statute.

The answer to your second question is somewhat more difficult. In arriving at an answer to this question we must, at the outset, point out that this does not involve a situation wherein property was omitted from assessment by never being placed upon the tax rolls. In that situation the result is clear. Cf; Section 72-6-9.10, N.M.S.A., 1953 Compilation. The situation here, however, is a case where the property was in fact rendered for taxation as required by the statutes, but through an error on the part of the State Tax Commission itself, the net valuation figure was understated. There is no indication that the taxpaying banks did not do all that the statutes required of them. In fact the record of reports reflects that they did comply with all requirements.

With these things in mind, the {*62} question resolves itself into whether the commission can revalue the shares and reassess the banks for prior years, during which the error was made, when the banks themselves were not responsible for the under-valuation. We think that it cannot. From our review of the state of law in this area, it appears that by the weight of authority and by the better reasoned view that a reassessment cannot now be made for prior years, when there is no statute expressly permitting this procedure. As was said in **People's Saving Bank v. Lagman**, 134 Fed. 635:

"The shares of stock were not correctly valued. But the mistake was one of law. The taxes have been paid on the shares of stock, and, there being no fraud, they should not again be assessed."

See also **Sluder v. Mahan**, 121 N.E. 2d 137 (Ind. App.); **State v. Atlas Life Insurance Company**, 177 Okla 457, 60 P. 2d 804; **Langhout v. First National Bank**, 191 Iowa 957, 183 N.W. 506 and **Tumulty v. District of Columbia**, 102 F.2d 254 in this regard.

While we believe that the majority rule is the better rule, it should be noted in passing that at least Florida and perhaps Louisiana have arrived at a contrary result. Cf: **Root v. Wood**, 155 Fla. 613, 21 So. 2d 133 and **Flourney v. 1st National Bank**, 197 La. 1067 3 So. 2d 244. The majority rule stated in another way is found **In Re Durant National Bank**, 230 Pac. 712 (Okla.) wherein the Court said:

"The courts are almost universal in holding also that, where property escapes its just share or proportion of taxation by reason of being grossly under-valued, the legislature may provide methods and means for reassessing the same. **We must however deal with the acts of the legislature in force and effect at the time and as we find them.**" (Emphasis supplied).

Before we conclude this opinion we must therefore determine whether there are any statutes now in force and effect that permit the Tax Commission to reassess the shares once they have been assessed. Our examination of the statutes reveals only one statute remotely connected to this problem. Section 72-6-9, supra, allows the

Commission to assess retrospectively property omitted from the tax rolls or property which has been erroneously described on the rolls. Such a statute does not permit reassessment for property assessed but undervalued. See **Hunt v. District of Columbia**, 108 F.2d 10, wherein the Court said:

"The rule approved by the great weight of authority in this country is that the power to assess 'omitted property' does not carry with it the power to revalue property already assessed. (citing numerous cases)."

The conclusion we have reached is strengthened when we look to Section 72-6-4 (3) which reads in germane part as follows:

"The actual value so determined, when certified by the commission shall be final and binding upon all tax officials of the State."

We interpret these words as expressing the legislative intention to prohibit revaluation or reassessment except in those cases where the statutes expressly permit such.

{*63} It is our conclusion therefore that the corrected form should henceforth be used but that the Commission may not revalue or reassess the shares of stock of banks for prior years for the under-valuation caused by the mistake in the Commission's form.

By: Boston E. Witt

Assistant Attorney General