

Opinion No. 66-39

April 4, 1966

BY: OPINION OF BOSTON E. WITT, Attorney General Roy G. Hill, Assistant Attorney General

TO: James L. Parmelee, Jr., Deputy City Attorney, P. O. Box 1293, Albuquerque, New Mexico

QUESTION

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Are capital debentures or notes issued pursuant to Section 48-22-28.1, N.M.S.A., 1953 Compilation (P.S.) to be treated as capital pursuant to the equitable distribution of public monies required by Section 11-2-33, N.M.S.A., 1953 Compilation (P.S.)?

CONCLUSION

No.

OPINION

{*46} ANALYSIS

Section 11-2-33, N.M.S.A., 1953 Compilation (P.S.) provides in part:

" . . . Provided that public monies so deposited shall be equitably distributed between all of the banks within the county so qualifying upon the basis of the relative capital stock and surplus of such banks . . . "

{*47} Under the rule that depositary laws are governed by the general rules of statutory construction, see 26A **Corpus Juris Secundum**, Section 7C, page 219 and under the statutory rule of construction in New Mexico that words used in a statute are to be given their ordinary and usual meaning, unless there is a clearly indicated different intent, see **State v. Marcus**, 67 N.M. 353, 355 P. 2d 287, it is our opinion that the words "capital stock" in the quotation from Section 11-2-33, supra, do not apply to capital debentures or notes issued by a bank in accordance with Section 48-22-28.1, N.M.S.A., 1953 Compilation (P.S.).

We believe the following definition of "capital stock" is both a good one and a representative one of the various cases which have described capital stock. This definition comes from **Commonwealth Bonding and Casualty Insurance Co. vs. Hollifield, Texas Civil Appeals**, 184 S.W. 776 at 778; "Capital stock" has been defined as follows:

"When applied to the amount subscribed towards the stock of a corporation, 'capital stock' of a corporation, in its primary sense, means the fund, property, or other means contributed or agreed to be contributed by the shareowners as the financial basis of the corporations business, either directly through stock subscriptions or indirectly through the declaration of stock dividends. The term signifies those resources the dedication of which to the uses of the corporation is made the foundation for the issuance of certificates of capital stock, and which, as the result of the dedication becomes irrevocably devoted to the satisfaction of all obligations of the corporation. . . . Capital stock of a corporation consists of the property and money subscribed and paid in for the purpose of carrying on its business. . . . The term 'capital stock' has a . . . definite meaning, and designates the amount of capital contributed by the stockholders for the use of the company."

The capital debentures provided for in Section 48-22-28.1, supra, are not within this definition of capital stock. Some of the significant language from that section is as follows:

"A. . . . Capital debentures or notes may be converted into shares of common or preferred stock in accordance with the provisions of the debentures or notes and under any terms or conditions prescribed or approved by the commissioner.

B. Capital debentures or notes are an unsecured indebtedness of the bank . . .

C. The amounts of outstanding capital debentures or notes legally issued by any bank shall be treated as capital for the purpose of computing the loan limits prescribed in section 48-22-24 New Mexico Statutes Annotated, 1953 Compilation, but for the purpose of computing the ad valorem tax prescribed in section 72-6-6 New Mexico Statutes Annotated, 1953 Compilation, the capital debentures or notes shall be treated as an indebtedness and not as capital."

Section 72-6-6, N.M.S.A., 1953 Compilation mentioned in Subsection C is titled "Method of Valuing Shares of Banks, Trust Companies and Mortgage Loan Companies" and is an implementing section of Section 72-6-4, N.M.S.A., 1953 Compilation which calls for the State Tax Commission each year to determine the actual value of the shares of the capital stock of all banks in addition to other institutions not important here.

Relying on the statutory rules of construction noted above and the definition of "capital stock" and the quoted New Mexico Statutory language, we believe it is clear that even though Subsection C of Section 48-22-28.1, supra, provides that the capital debentures or notes may be treated as "capital" for the purposes of computing the loan limit as prescribed by Section 48-22-24, N.M.S.A., 1953 Compilation, that these debentures or notes are actually an indebtedness of the banks unless and until they are converted into shares of common or preferred stock. Since {48} they represent indebtedness and not an ". . . amount of capital contributed by the stockholders for the use of the company," they are not capital stock within the meaning of Section 11-2-23, supra.

We have therefore concluded that the answer to your question is no.