Opinion No. 67-39

March 6, 1967

BY: OPINION OF BOSTON E. WITT, Attorney General

TO: Income Tax Division Bureau of Revenue State of New Mexico Santa Fe, New Mexico

QUESTION

FACTS

Under Subchapter S of the Internal Revenue Code of 1954, (Sections 1371 through 1378) certain corporations may elect not to pay federal corporate income tax. If the election is made, shareholders must include in their gross income for federal income tax purposes a proportionate share of the corporation's income is treated as a distribution of a dividend.

QUESTIONS

1. Is a nonresident shareholder of New Mexico corporation which elects subchapter S treatment subject to New Mexico income tax on his proportionate share of the corporation's income?

2. Is the nonresident shareholder of a foreign corporation donig business in New Mexico which elects subchapter S treatment subject to New Mexico income tax on his proportionate share of the corporation's income?

CONCLUSION

1. See analysis.

2. See analysis.

OPINION

{*51} **ANALYSIS**

Section 72-15A-3, N.M.S.A., 1953 Compilation (1965 P.S.) provides that:

A tax is hereby imposed at the rates specified in sections 5 and 6 (72-15A-5 and 72-15A-6) upon the net income of every resident individual and every domestic corporation and upon the net income of every foreign corporation and every nonresident individual employed or engaged in the transaction of business in, into or from this state, or

deriving any income from any property or employment within this state. (Emphasis added)

Both questions raise the issue of whether or not corporate stock held by a nonresident is property within the State of New Mexico within the contemplation of Section 72-15A-3, supra. It is a general rule that for tax purposes, shares of stock in a corporation have a situs at the owner's domicile. **First Bank Corp. v. Minnesota,** 301 U.S. 234, 241, 57 Sup. Ct. 677, 81 L.ed. 1001 (1937); 14 Fletcher, **Cyclopedia Corporations** 7003 (perm ed. rev. 1965). In general, therefore, stock held by a nonresident in either a domestic corporation or a foreign corporation doing business in New Mexico is not property within the State of New Mexico within the meaning of Section 72-15A-3, supra. Opinion of the Attorney General No. 4725, dated May 23, 1945. In this situation, the shareholder's proportionate share of the corporation's income would not be subject to New Mexico income tax.

An exception to this general rule is where shares of stock have a "business situs" in a state other than the owner's domicile. In this situation, the state of the business situs has jurisdiction to tax income attributable to the stock. 14 Fletcher, **Cyclopedia Corporations** 7003.1 (per. ed. re. 1965). Intangible personal property acquires a business situs when it is used as an investment or as an integral part of a continuous and permanent business conducted in another state. **United Gas Corp. v. Fontenot,** 129 So. 2d 716 (La. 1961); **Kahan v. Schonwald,** 1135 P.2d 971 (Okla. 1943); **St. Louis Union Trust Co. v. State,** 155 S.W. 2d 107 (Mo. 1944). The physical evidence of the intangibles, however, need not be located in the business situs state. **Southern Pac. Co. v. McColgan,** 156 P.2d 81 (Cal. 1945).

The Uniform Division of Income for Tax Purposes Act (Sections 72-15A-16 through 72-15A-36, N.M.S.A., 1953 Compilation (1965 P.S.)) contains a statutory exception to the general rule. If a nonresident shareholder elects to allocate and apportion his net income in accordance with the Uniform Act, his proportionate share of the corporation's income is allocable to New Mexico if his commercial domicile is in New Mexico. Section 72-15A-23, N.M.S.A., 1953 Compilation (1965 P.S.). Commercial domicile means the principle place from which the trade or business of the taxpayer is directed or managed. Section 72-15A-17B, N.M.S.A., 1953 Compilation (1965 P.S.).

The questions presented cannot be answered without an analysis of the business activities of each nonresident shareholder in New Mexico.

By: Edward R. Pearson

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