Opinion No. 19-2441

November 29, 1919

BY: N. D. MEYER, Assistant Attorney General

TO: State Tax Commission, Santa Fe, New Mexico.

Construction Franchise Tax Law.

OPINION

Your letter of September 5 addressed to the Attorney General containing ten questions based on the Franchise Tax Law, which appears as Chapter 100 of the Session Laws of 1919, was referred to the writer by Mr. Bowman upon his departure for the east, but reply has been delayed, partly for the reason of a great amount of work in the office and partly because some of the questions present matters very difficult to answer and involve a great deal of work and research in order to come to a conclusion upon the interpretation of the law.

The questions asked are answered in the order set forth in your letter with a synopsis of the question stated before each answer.

I

"Are mutual building and loan associations subject to the Franchise Tax under Chapter 100 of the Session Laws of 1919?"

A careful examination of our statutes concerning building and loan associations impel me to come to the ultimate conclusion that under the same, building and loan associations are corporations organized and doing business for profit, therefore it follows that under the provisions of Chapter 100 of the Session Laws of 1919, such corporations are subject to the payment of the franchise tax in accordance with Section 5 of said act.

II

"A foreign corporation has complied with the law of this state and has a statutory agent. They have no property or office in the state; all orders received from New Mexico are accepted and filled at the Denver office. Is such a corporation subject to the Franchise Tax?"

This involves the consideration of what is "doing business in this state" and before answer can be made, this must be determined.

In the case of the Singer Manufacturing Company vs. Adams, State Revenue Agent, et al., 165 Fed. 877, where a question was being litigated involving a condition almost identical with that presented in your question, the Circuit Court of Appeals stated in its decision:

"Where a non-resident corporation had one or more local agencies in Mississippi in control of salesmen, selling sewing machines throughout a limited number of counties and reporting to such local agency, which in turn reported to a district agency in another state, the corporation during such period was doing business within the state and taxable on credits as provided by revised Code Mississippi 1880, Section 497, but not so during a period when it had neither office, store nor managing salesman in the state and did business only through traveling salesmen who transmitted all cash collected and contracts arising from the disposition of machines to agencies outside the state."

The case you state is very similar to the position which the mailorder houses occupy in respect to selling goods in this state. Take for instance Montgomery, Ward & Company from Kansas City. They have no certificate of admission to do business in the state, notwithstanding this fact, they accept and fill orders received from New Mexico in Kansas City.

It would seem from reading the authorities on taxation that a corporation is only liable to state taxation based upon its "doing business" if in fact it does business, in the state, and what constitutes "doing business" under such circumstances is to be determined from what it actually does. It cannot consist in the corporation doing what it has the right to do without the consent of the state. Therefore, in answer to the second question, I would state it is my opinion that the corporation is not engaged in business within the meaning of the Franchise Tax Act; and that, for that reason they are not subject to the franchise tax.

I believe, that a corporation has the right to take orders in this state, accept and fill them in a foreign state without procuring a certificate of admission to do business here. So, the fact that such a corporation has a certificate of admission to do business does not alter the case, because as hereinbefore stated, the authorities hold that a corporation cannot be taxed for doing that which it has the right to do without a necessity of securing the state's consent. If such a corporation would establish an agency with offices in this state, where actual transaction of business took place and business carried on separately from the home office, then in my opinion such corporation would be engaged in business in this state.

III

"A Delaware corporation purchased a mine in this state and secured authority to do business here. They have a statutory agent. At present the mine is not being operated, the only business being the employment of a watchman and the operation of a pump to keep the mine unwatered. Would you consider that they were "engaged in business" within the meaning of the act?"

Judson on taxation at Section 189 states:

"Neither does the ownership within its jurisdiction of property, which becomes subject as property, to the taxing laws of the State, constitute of itself doing business by the corporation therein." (Mo. Coal Mining Co. vs. Ladd, 160, Mo. 435.)

It hardly appears to me that the ownership of property as for instance, the case which you mention in this question, is the doing of business here which the act in question contemplates. The owners of this property are, of course, amenable to the property tax law of the state, and it does not seem reasonable to me to construe this law to mean, that because the said property is held by a corporation that they should on top of the regular property tax, also pay a franchise tax when they are not actually engaged in a commercial operation of their mine.

Our statutes further specifically provide that a foreign corporation may acquire and hold real estate without the necessity of securing a certificate of authority to transact business in the state. (See Section 983-984-986, Code 1915). Thus it would seem that what was said in answering the previous question in regard to a corporation doing that which it has the right to do, without securing permission from the state, without being subject to the franchise tax, could be applied with force as an argument why, a foreign mining company, that merely holds mining property, should not be subject to the franchise tax.

There is another point that occurs to my mind in this connection. If a mining company is organized and its charter or articles of incorporation show that the business of the company is to engage in mining, **to hold** mining property, etc., it would seem that the holding of mining property would be doing the kind of business for which it was organized; the holding of property being one of its objects of incorporation. It can readily be seen that a corporation, such as you mention in this connection, could engage in doing nothing else but buying, holding and selling mining property as its business and operate this enterprise at a profit. The above is a suggestion for the State Tax Commission to consider. I am unable to find authority upon which to base an opinion. The State Tax Commission should, therefore, exercise their own discretion and judgment in the matter.

IV

"A corporation organized under the laws of a foreign country authorized to do business in the State of New Mexico. Its property has been conveyed in trust to a Board of Trustees for the purpose of liquidating the company and conducting its operation pending its liquidation. The receipts or profits of such operations are applied on a bond redemption. It would appear that the Board of Trustees are not incorporated but that in their actions the seal of the corporation is used and annual report is filed with the State Corporation Commission in behalf of this corporation. The officers are given as "The Board of Trustees" of such corporation. Is the corporation doing business within the meaning of the act?"

In answer to this question, I would state that it is our opinion that the corporation mentioned is subject to provisions of Chapter 100 of the Session Laws of 1919.

V

You state that the Southern Pacific Railroad Company has leased its railroad in this state to the Southern Pacific Company, and ask if the said Southern Pacific Railroad Company is not subject to the State Franchise Tax Act.

We note that the representatives of the Southern Pacific Railroad Company cited McCoach vs. Minehill Railroad Company, in which case it appears that the court decided that the lessor in that case, the Minehill Company, who had leased its railroad properties to the Reading Railroad Company, was not engaged in business, and therefore, not subject to the franchise tax, but that the said Reading Railroad Company was the company who was engaged in the operation of said railroad properties, and "doing business" within the meaning of the corporation tax law.

It appears that this case is quite in point with that of the Southern Pacific Railroad Company and the Southern Pacific Company, and that although it controls the majority decision of the Supreme Court in the McCoach vs. Minehill Railroad was as above stated, that Justices Day, Hughes and Lamar rendered a dissenting opinion. We have read of the same and think there is much good reason and forceful argument in the dissenting opinion. I quote one paragraph of the opinion which gives in concise form the gist of the same.

"We are therefore, brought to the direct question, is a live corporation which, though it has leased its railroad property for a term of years, maintains and has agreed to maintain its corporate organization, collects and distributes an annual rental of $ 252,612, keeps and maintains an office and office force at large expense, deposits money upon interest and receives and distributes the earnings thereof, invests a large fund which, together with interest on deposit, yields over $ 24,000 a year "doing business" within the meaning of the Corporation Tax Act? The amount of business done is utterly immaterial. The doing of any business with the advantages which inhere in corporate organization brings the corporation within the terms of the act. Such was the ruling in the Flint Case after full consideration by this court of the terms and scope of the law."

It appears to the writer that the decisions of the court on this subject are not uniform. We have, of course, the majority decision in McCoach vs. Minehill, above referred to, which on its face upholds the contention of the Southern Pacific Railroad Company but we would not venture to say that if the case of the Southern Pacific Railroad was taken to the Supreme Court, the McCoach vs. Minehill case might not be distinguished, as we have not before us all the details appertaining to the Southern Pacific Railroad Company, as we have in all the cases which we have read in making our investigation.

VI

"The Southern Pacific Company claims that the franchise tax of our state does not affect them, for the reason that they have leased all their interests to the United States Railway Administration and are not engaged in business."

It is my information that railroad companies whose property is under control and administration of the United States Railroad Administration rely on the case of McCoach vs. Minehill Railroad, 228 U.S. 295, to sustain their position that they are not engaged in business and not subject to the franchise tax laws.

The Act of Congress under which transportation systems were taken under control of the Federal Government disposes of this proposition. The framers of the act, evidently foresaw this contingency and made adequate provisions for establishing the status of railroad companies in regard to their liability under state franchise tax laws.

Section 15 of the Act provides as follows:

"That nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the States in relation to taxation, or the lawful police regulations of the several states, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, government supplies, or the issue of Stocks and Bonds."

The third paragraph of Section 1 of the Act provides:

"Every such agreement shall provide that any Federal taxes under the Act of October third, nineteen hundred and seventeen, or Acts in addition thereto or in amendment thereof, commonly called war taxes, assessed for the period of Federal control beginning January first, nineteen hundred and eighteen, or any part of such period, shall be paid by the carrier out of its own funds, or shall be charged against or deducted from the just compensation; **that other taxes assessed under Federal or any other governmental authority for the period of Federal control or any part thereof, either on the property used under such Federal Control or on the right to operate as carrier,** or on the revenues or any part thereof derived from operation . . . **shall be paid out of revenues derived from railway operations while under Federal Control.**

It is my opinion that it was not the intention of the Federal Government to cause any of the several states to be deprived of any tax provided for by law, and I am further of the opinion that under that part of paragraph three of Section one above quoted, the franchise tax is payable by the Southern Pacific Company, even though it be under Federal Control and should be paid out of the revenues derived from its operation.

VII

Relative to whether or not a company which is in the hands of a receiver is engaged in business, I beg to advise that it is my opinion that if such receiver is operating the business of the corporation under its franchise the corporation is liable to the tax and

the same should be paid by the receiver from the funds of the company. "Where the receiver of an insolvent private corporation continues its business using its franchise, he must pay its franchise tax assessed while he conducts the business." 30 Atl. 321.

VIII

It is my opinion where a corporation files its annual report; elects officers; holds property and negotiates loans on the same but is not actively engaged in business, that said corporation is not "engaged in business" within the meaning of our franchise tax law.

IX

In answer to your question as to whether the Commission has authority to consider any features contained in the reports of domestic corporations or if the commission must base its assessment on the authorized capital stock, I advise that the last paragraph of Section three, of the Franchise Tax Law, which appears as Chapter 100 in the Session Law of 1919, seems to make it quite clear that the Commission shall determine the amount of the authorized capital stock of each corporation employed in the state and shall assess and certify to the State Auditor the amount of the annual state franchise tax to be paid by each corporation at the rate of $ 10 for each $ 100,000, or fraction thereof, of the authorized capital stock of said corporation, represented by its property and business done here. The law explicitly directing the method to be pursued by the Tax Commission in determining the amount of the franchise tax to be assessed against each corporation excludes all other methods for a different procedure.

X

The procedure set forth in the last paragraph of Section four, of the franchise tax law to be followed by the Tax Commission in determining the amount of taxes to be paid by each corporation is as mandatory as that provision of the law which sets forth the method of assessing domestic corporations mentioned in the foregoing paragraph and it does not appear to me that the commission can, in the face of the expressed method of assessing corporations as adopted by the legislature, deviate from that method to another. As I understand the provisions of Section four, the Commission is to determine what proportion of the authorized capital stock the property and business done in this state represents.

Trusting that this letter will be of some value to you in clarifying some of the questions asked in your letter to which this is an answer, I beg to remain,