Opinion No. 37-1610

April 22, 1937

BY: FRANK H. PATTON, Attorney General

TO: Mr. Benj. D. Luchini Chief Tax Commissioner Santa Fe, New Mexico

*{*79}* We have your letter of April 20, 1937, requesting an opinion as to *{*80}* the method of valuing, for purposes of assessment, the common stock in banks also having preferred stock owned by the Reconstruction Finance Corporation. You cite two examples as follows:

"Example 'A'

Capital Stock $ 500,000.
Less Preferred Stock of
RFC 250,000.
Common Stock $ 250.000.
Surplus 100,000.
Undivided Profits 26,152.
$ 376,152.
Less Surplus up
to 50% 100,000.

$ 276,152.
Less Real Estate 328,500.

Value of stock for
taxation none.

"Example 'B'

Capital Stock $ 500,000.
Surplus 100,000.
Undivided Profit 26,152.

$ 626,152.
Less Surplus up
to 50% 100,000.

$ 526,152.
Less Real Estate 328,500.

Value of all stock $ 197,652.
Less 250 shares

RFC stock 98,826.

Val. 250 shares common
stock $ 98,826.
or $ 39.53 per share."

Preferred stock, so long as it is owned by the Reconstruction Finance Corporation, is exempt from taxation by the Act of March 20, 1936, Chapter 160, Sec. 1, 49 Stat. 1185, 12 U. S. C. A., Sec. 51-D.

Section 141-504, 1929 Statutes Annotated, provides that the stockholders "shall be assessed and taxed on the value of their shares of stock." It provides that from the aggregate amount of the capital, surplus and undivided profits there shall be deducted the real estate assessed against the bank, and surplus up to fifty per cent (50%) of the capital stock, and the remainder taken as the basis for **valuation** of the shares in the hands of stockholders. The question raised by you is whether in exempting the shares of stock owned by the Reconstruction Finance Corporation, the par value of such stock shall be deducted from, and not considered as part of, the "capital stock" in this mathematical formula used in computing the assessable value of bank stock.

In considering this matter we should bear in mind that the assessment being made is not on the capital or capital stock of the bank, but on the shares of stock as distinct property in the hands of the shareholders. State vs. State Trust and Savings Bank, 31 N.M. 282; First State Bank of Mountainair vs. State Tax Commission, 40 N.M. 319.

"'The capital stock of a bank and the shares of the capital stock, are distinct things. The shares of stock are owned by the stockholders individually, but the **capital stock** and the profits earned by its use belong to the bank. No portion of a bank's capital stock is private." Michie, Banks & Banking, Vol. 8, Ch. 4, Sec. 2.

The full $ 500,000. par value of the shares of stock represent the capital stock, which is the property of the bank. None of that is being taxed as such, nor can it be considered as such in determining what is to be exempted. It is the individual shares of stock that are taxable, and the individual shares that are exempted as such if owned by the Government. The capital stock, surplus and undivided profits come into the picture only as elements from which *{*81}* the value of the shares may be determined.

Supposing that the Courts should hold, as they did in 1936, that the stock exempted was in fact assessable, and should order it assessed: could it be contended that such stock must then be assessed at par? Such would necessarily be the result in that event if the stock were exempted at par value.

Further, using the par value of common stock only as the capital stock, in applying the formula provided by the statute to determine the value of the shares for assessment purposes where the capital was in fact composed of both common and preferred stock, would result in discrimination against holders of stock in national banks having only common or privately owned stock, and would be in contravention of Section 5219 of the United States Code which requires that assessments of national bank stock be not made at a higher rate than other moneyed capital.

My conclusion, therefore, is that the preferred stock is a part of the capital stock from which the real estate and surplus is to be deducted, and that the resulting proportionate value of each share is the value at which stock is to be assessed where assessable, and exempted where exempt. This is the method used by the State Tax Commission for the year 1936 and so far no complaint has been made about it in the courts.

By: A. M. FERNANDEZ,

Asst. Atty. Gen.