Opinion No. 37-1614

April 23, 1937

BY: FRANK H. PATTON, Attorney General

TO: State Corporation Commission Franchise Tax Department Santa Fe, New Mexico

*{*82}* This is to acknowledge receipt of your letter of April 22nd in which you wish an opinion upon the application of Chapter 116, Laws of 1935, to the taxability of the Potash Company of America. You make the following inquiry:

"The enclosed report filed by the Potash Company of America, Carlsbad, New Mexico, shows $ 1,230,892.49, as receipts derived from property in this State. However, the company states that although the product sold was mined in this State, all sales were made and consummated outside the State of New Mexico.

*{*83}* "In computing the tax, would this be considered business within or without the State of New Mexico."

Section 2 of the act above quoted levies a tax at the rate of one dollar per thousand of the par value of that proportion of the company's authorized and issued capital stock represented by its property and business in this state. Although property outside of the state and property used exclusively in interstate and foreign commerce is to be excluded in making the tax assessment, no such exemption is found in the matter of receipts from the particular business. It is our opinion that if the receipts are attributable to business done in this state, they should be considered regardless of whether the same are derived from business done in interstate commerce.

A question almost identical to the one presented here was considered by the Supreme Court of California in Matson Nav. Co. vs. State Board of Equalization, 43 P. (2d) 805. In that case the corporation sought to have excluded from its report receipts from business done in interstate commerce and, passing upon this question, the Court used the following language:

"The act does not specifically provide that income from business, done in interstate or foreign commerce originating in this state shall be included in the measure of the tax. Such specific provision is not necessary, however, if the language employed is broad enough to and actually does include such income, and if such income is not otherwise excluded. It is our opinion that the provisions of the act include in the measure of the tax all income, however earned, unless such income is specifically excluded, and that since there is no provision specifically excluding the type of income here involved, it is necessarily included.

* * *

"Petitioners concede that a state, under the above authorities, can impose a net income tax and impose the tax on income from interstate commerce, but contend that the principles applicable to a state's power to impose franchise taxes measured by net income are entirely different from the principles applicable to a state's power to impose taxes upon net income. There are some differences between the two situations, it is true, but such differences do not affect the situation here presented. When a foreign corporation comes into this state and does some intrastate business, as well as interstate business originating here, it cannot be taxed for the privilege of engaging in interstate commerce, but it may be taxed for the privilege of engaging in intrastate commerce. In fixing that tax, the state may require the corporation to pay for that privilege a tax measured by its net income attributable to business done in this state, regardless of whether the income is derived from intrastate business or from business done in interstate or foreign commerce. The cases of Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113, 41 S. Ct. 45, 65 L. Ed. 165, and Bass, Ratcliff & Gretton, Ltd., v. State Tax Commission, 266 U.S. 271, 45 S. Ct. 82, 69 L. Ed. 282, squarely support this conclusion."

This case was affirmed by the Supreme Court of the United States. See Matson Nav. Co. vs. State Board of Equalization, 297 U.S. 441. The Court there substantially adopted the reasoning of the California Supreme Court.

*{*84}* This case, we think, disposes of your inquiry and it is our opinion that the receipts derived from interstate commerce should be included in the return of the taxpayer, provided they are attributable to business done within the state. We think that the record reflects that the receipts in question are governed by the principles announced above.

By: RICHARD E. MANSON,

Asst. Atty. Gen.