Opinion No. 37-1699

July 2, 1937

BY: FRANK H. PATTON, Attorney General,

TO: State Corporation Commission Franchise Tax Department Santa Fe, New Mexico. Attention: Miss Ella B. Bell.

*{*133}* This is to supplement our Opinion No. 1614 dated April 23, 1937, relative to the franchise tax report of the Potash Company of America.

In Opinion No. 1614 we held that $ 1,230,892.49, the same being the gross receipts derived from the sale of potash mined in New Mexico, should be included as business done within the State of New Mexico, in assessing that Company's franchise tax for the year 1937. We relied upon the case of Matson Nav. Co. vs. State Board of Equalization, 43 P. (2d) 805, affirmed 297 U.S. 441.

Since that opinion was written, we received a letter from the firm of Hervey, Dow, Hill & Hinkle, attorneys for the Potash Company of America, and a letter from Mr. F. O. Davis, Comptroller of the Company, in which it is seriously urged that the case above cited does not control because it involved the application of a tax upon the net income of a corporation, rather than a franchise tax typical of the New Mexico act. It is pointed out that the Company transacts no interstate business whatsoever, with the exception of mining its product; that all sales are made through the Company's Baltimore office and no potash whatsoever is sold for delivery within the State of New Mexico.

From these facts it is contended that if the gross proceeds of the sales of the potash mined in New Mexico are included the same will constitute a burden upon interstate commerce because it will amount to a tax upon the gross receipts derived from interstate business. Many cases are cited to support the contention that a gross receipts tax is unconstitutional as a burden on interstate commerce. The correctness of this general statement cannot be challenged. However, Chapter 116 of the Laws of 1935 is not a gross receipts tax. The gross receipts of business transacted in New Mexico is merely an element to be considered in making the assessment. The fact that part of the proceeds of such gross receipts include funds derived from interstate commerce would not render the act unconstitutional. This much was held in unmistakable terms in the case of Hump Hairpin Company v. Emerson, 66 L. Ed. 622, and in Western Coal Company vs. *{*134}* Emerson, 74 L. Ed. 1005. The only difference between the Hump Hairpin Company case, supra, and the situation presented by the facts in the case at bar is one of degree. In the Hump Hairpin Company case a greater part of the gross proceeds of the business was derived from transactions in interstate commerce, while in the fact situation here presented all of the gross proceeds, according to the statement of the company, are derived from sales in interstate commerce. In the Hump Hairpin Company case, supra, the court held that whether or not the tax was a burden on

interstate commerce was a question to be determined from the circumstances of each case.

Whether or not the court would sustain the tax as imposed upon the Potash Company of America in this case would, therefore, in my opinion, be an open question, and in our opinion it is close enough to justify the imposition of the tax as suggested from Mr. Davis' letter of June 26, 1937. However, we do not wish in any manner to recede from our original construction of the act. It is still our opinion that under the authority of Hump Hairpin Company vs. Emerson, supra, Western Coal Company vs. Emerson, supra, and Matson Nav. Co. vs. State Board of Equalization, supra, gross proceeds of sales or income in interstate commerce should be included in computing the franchise tax, provided the same are connected or are attributable to business done within this state.

By RICHARD E. MANSON,

Asst. Atty. Gen.