

Opinion No. 38-1931

April 13, 1938

BY: FRANK H. PATTON, Attorney General,

TO: Mr. George M. Biel Superintendent of Insurance State Corporation Commission
Santa Fe, New Mexico

{*226} By your written request of April 12 you desire an interpretation of our retaliatory tax law pertaining to foreign insurance companies doing business in this State.

Our retaliatory tax law, Section 71-129, New Mexico Statutes Annotated, 1929 Compilation, provides as follows:

"Retaliatory taxes and fees. Whenever, by the laws of any other state or country, any taxes, fines, penalties, licenses or fees in addition to or in excess of those imposed by the laws of this state upon foreign insurance companies and their agents doing business in this state, are imposed on insurance companies of this state and their agents doing business in such other state or country, or whenever any conditions precedent to the right to do business in such other state or country are imposed by the laws thereof beyond those imposed upon such {*227} foreign insurance companies by the laws of this state, the same taxes, fines, penalties, licenses, fees and conditions precedent shall be imposed upon every similar insurance company of such other state or country and their agents doing or applying to do business in this state, so long as such foreign laws remain in force; and upon the failure of any such foreign insurance company to comply therewith, the superintendent shall revoke its certificate to do business in this state, or shall refuse to grant such license or certificate in the first instance."

Your fact situation presents the case of an insurance company organized and incorporated in California but doing an insurance business in this State. Our laws provide for the payment of a primary tax of two per cent on gross premiums collected by insurance companies in this State. Under the California law the payment of a tax of 2.6% on gross premiums is required of New Mexico insurance companies doing business in that State. It is conceded by the California company, for the purposes of this opinion, that this State may levy a 2.6% gross premium tax on premiums collected by such company in this State, and this by virtue of Section 71-129, supra.

Our law, however, in addition to the gross premium tax, requires the payment by such company of \$ 50.00 for filing the annual statement, \$ 50.00 for annual license fee, and \$ 200.00 for entrance fee, or a total of \$ 300.00; whereas a New Mexico company doing business in California would pay only \$ 105.00 for entrance fee and \$ 10.00 for annual license fee, or a total of \$ 115.00, no fee being imposed in California for filing the annual statement. This results in a difference of \$ 185.00 between the California fees and the New Mexico fees.

Your inquiry is whether in computing the tax due from the California company a deduction of \$ 185.00 should be allowed.

It is our opinion that the California company is entitled to the deduction, provided that in no event should the amount payable to this state be less than two per cent of the amount of premiums collected, that being the primary rate fixed by our laws.

Retaliatory tax statutes are intended to level the amount of taxes. Equality is the result aimed at, and is achieved when the ultimate taxes levied are equal. It is our opinion that the retaliatory tax statute, *supra*, is complied with when the California company pays to this State an amount equal to the total tax payable to California by a New Mexico company doing the same volume of business in that State.

We base our opinion on the following decisions: *Bankers Life Co. vs. Richardson*, 192 Cal. 113, 218 P. 586; *Cochrane vs. Bankers Life Co.* (C. C. A. 8th), 30 F. (2d) 918; *Metropolitan Life Ins. Co. vs. Commonwealth*, 198 Mass. 466, 84 N. E. 863; *Life & Casualty Co. vs. Coleman*, 233 Ky. 350, 25 S. W. (2d) 748; and *Union Central Life Ins. Co. vs. Lowe*, 349 Ill. 464, 182 N. E. 611. For an extensive annotation on retaliatory tax laws, see also 91 A. L. R. 795.

By: FRED J. FEDERICI,

Asst. Atty Gen.