Opinion No. 43-4308

June 2, 1943

BY: EDWARD P. CHASE, Attorney General

TO: Mr. Ralph F. Apodaca, Superintendent of Insurance, Santa Fe, New Mexico

We are in receipt of your letter of May 24, 1943, the exhibits and the enclosed letter from Mr. Primer, Assistant Auditor of the St. Paul Fire and Marine Insurance Company. You ask whether the St. Paul Fire and Marine Insurance Company is required to pay the taxes and fees imposed by the State of Minnesota, its domicile, which are greater than those imposed by the State of New Mexico, as provided by Section 60-403 of the New Mexico 1941 Compilation.

This involves the question of whether the New Mexico retaliatory tax law, being Section 60-403, becomes operative immediately upon the passage of a law by any foreign state levying any taxes or fees in addition to those imposed by New Mexico on foreign insurance companies (or the existence of such a law at the time of the passage of 60-403), or whether the retaliatory tax law comes into operation only when a New Mexico insurance company enters such foreign state. This section, insofar as is material here is as follows:

"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 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;"

The contention of the St. Paul Insurance company, of course, is that by the language "are imposed on insurance companies and their agents doing business in such other state" that this section becomes applicable only when a New Mexico company actually does business in such foreign state, and hence actually pays such fees. However, after a careful reading of this section, it is noted that the test set up is not whether a New Mexico insurance company does, in fact, pay any taxes or fees in addition to those it would have to pay in New Mexico, but whether the foreign state, by law, imposes such additional taxes or fees. This is the decision reached by a majority of the cases interpreting statutes similar to Section 60-403, and which cases, to the view of the writer, are the better reasoned. Any other construction would defeat the obvious intention of the Legislature, since such additional taxes and fees imposed by such other state may be the very reason no New Mexico company is operating in such other state.

The leading case upon this question is Germania Insurance Company v. Swigert, 128 Ill. 237, 21 N. E. 530. The Illinois statute, which the court was called upon to construe in that case is in part as follows:

"Whenever the existing or future laws of any state * * * shall require of insurance companies incorporated by or organized under the laws of this state, and having agencies in such other state, * * * of any payment for taxes, fines, penalties, certificates of authority, license fees, or otherwise, greater than the amount required for such purposes from similar companies of other states * * *."

This statute then provides for the imposition of retaliatory taxes. It is noted that the only difference pertinent here between this statute and Section 60-403 is that the Illinois statute uses the language "having agencies in such other states," while our statute uses the language "doing business in such other state," both of which provisions mean, in effect, the same thing.

In holding that the Illinois statute became operative upon the enactment by the other state of the law with additional taxes, and that it was immaterial that there was no Illinois company doing business in such other state, the court said:

"The 'time when' is plainly 'whenever the existing or future laws of any state * * * shall require, * * * and when such companies shall have agencies in such other state,' etc. Does a law any the less require a thing to be done because there is no present subject-matter upon which to operate? The requirement of the law is but the declaration of the rule to be observed, and it must antecede the facts which call it into action. The existence of the law and the existence of a present subject-matter upon which it will take effect are entirely distinct things."

The court then pointed out that there was no procedure set up in the insurance laws by which the auditor, who was charged with collecting insurance fees, could determine which Illinois companies were doing business in other states. The identical situation exists in New Mexico.

In State v. Insurance Company of N. A., 71 Neb. 335, 100 N. W. 405, that court had before it a statute identical in all essential features to the Illinois statute above quoted. In reaching the same conclusion reached in the Swigert case, the court pointed out that:

"We may assume that the sole reason no Nebraska companies are doing business in Pennsylvania, if such be the case, is because of the severity of the restrictions imposed by the laws of Pennsylvania upon insurance companies organized under the laws of other states, which are not applicable to domestic companies."

In Phoenix Insurance Campany v. Welsh, 29 Kans. 672, the court reached the same conclusion under a similar statute therein answering the same contention as is put forth by the St. Paul Fire and Marine Insurance Company the court said:

"It is insisted that as no Kansas insurance corporation has applied for admission to the state of New York, the contingency named in the section has not arisen. This we think is a mistake. The contingency named is not that New York is in fact imposing the extra burdens upon one of our corporations, but that the laws of that state provide for such extra burdens. Whenever those laws require it, then the contingency named in our statute has arisen."

To the same effect see also Union Central Life Insurance Company v. Durfee, 164 Ill. 183, 45 N. E. 441; Phillips v. Fidelity and Company, 77 Iowa 648, 42 N. W. 509; and Talbott v. Casualty Company (Md.) 22, Atl. 395.

In addition to what has been said above, the writer also wishes to call attention to the second portion of the section above quoted wherein it is provided that if conditions precedent to the right of New Mexico companies to do business in a foreign state are imposed by such state, that similar conditions precedent will be imposed on foreign companies from such state in seeking to do business in New Mexico. As taxes and fees imposed on foreign insurance companies must be paid before such company can do business in a state such as Minnesota, this is a condition precedent to the right to do business, so that New Mexico may impose a similar condition precedent under this section upon a Minnesota company, which condition precedent would be the payment of the same fees or taxes.

The writer has made an exhaustive search of the authorities on this question, and has written a lengthy opinion because various insurance companies have questioned former opinions of this office which have reached the same conclusion without the citation of any considerable authority. I might also state that the case of Life and Casualty Insurance Company of Tennessee v. Coleman, a copy of which is forwarded by Mr. Primer, does not appear to me to have any bearing on the question propounded, as the only question there involved was as to what fees and taxes should be taken into consideration. It is noted, however, that all through this case the court has assumed that all that was necessary to bring the act into operation was that a foreign state have a law placing additional burdens on insurance companies of the home state.

Trusting that the foregoing sufficiently answers your inquiries, I am

By ROBERT W. WARD,

Asst. Atty. General