

Opinion No. 45-4674

March 7, 1945

BY: C. C. McCULLOH, Attorney General

TO: Eugene Allison, Chairman State Corporation Commission Franchise Tax
Commission Santa Fe, New Mexico

{*33} Replying to your letter of March 5, 1945, requesting an opinion as to the liability of a broadcasting station, incorporated under the laws of New Mexico in the year 1931, for filing a franchise tax report and payment of franchise tax under Sections 54-1201 to 54-1212 inclusive, of the New Mexico 1941 Compilation, being Chapter 116 of the New Mexico 1935 Laws.

In your letter you state that the President of the corporation "contends that this corporation is not subject to franchise tax assessments for the reason that this corporation is engaged exclusively in interstate commerce."

Section 54-1203 of the New Mexico 1941 Compilation very clearly sets forth the requirement for making the annual report by every domestic corporation and no exception is provided:

"54-1203. Annual report of domestic corporation -- Contents -- Assessment of tax. -- Every domestic corporation for profit engaged in business in this state shall annually on or before the fifteenth day of March, make and file with the commission a report in such form as the commission may prescribe, and signed and sworn to by the president, vice-president, secretary or principal accounting officer of the corporation, which report shall show as of the first day of January preceding, the following:

(1) The name of the corporation.

{*34} (2) The location of its registered office in this state and the name of the agent therein and in charge thereof upon whom process against the corporation may be served.

(3) The names of the president, vice-president, secretary or principal accounting officer, treasurer, and members of its board of directors, with the post-office address of each.

(4) The date of the annual election of officers.

(5) The amount of authorized capital stock; the amount of capital stock subscribed; the amount thereof issued and outstanding and the amount of capital stock paid up.

(6) The nature and kind of business in which the corporation is engaged and its principal place or places of business, both within or without the state.

(7) The value of the property owned and used by the corporation in this state and where situated; and the value of the property owned and used outside of this state and where situated.

(8) The total gross receipts derived from its property and business in this state, and the total gross receipts from its property and business, both within and without this state during the last preceding year.

(9) The change or changes, if any, in the above particulars made since the last annual report.

From such report or such other information as it may be able to procure, the commission shall, prior to the 15th day of April of each year, determine the proportion of the authorized and issued capital stock of such corporation represented by its property and business in this state and shall assess the amount of the annual state franchise tax to be paid by each such corporation, at the rate of one (\$ 1.00) dollar for each one thousand dollars (\$ 1,000), or fraction thereof, of the par value of that proportion of its issued capital stock, represented by its property and business in this state as determined by the commission, and which tax shall attach as of January 1st of the year in which assessed."

It appears that the legislature had in mind that the "commission" was expected to determine from the report whether the corporation was doing interstate, intrastate or a combination of both interstate and intrastate business and arrive at the proper tax due under the above Section 54-1203 and Section 54-1206 of the same act which reads as follows:

"54-1206. Property exempted from assessment. -- In making the assessment provided by this act there shall be excluded the property of any corporation situate without the state of New Mexico, or used exclusively in interstate or foreign commerce."

We note the Corporation has relied on the case of Fischer's Blend Station, Inc. vs. Tax Commission of Washington, 182 Wash. 163 45 Pac. (2d) 1151, appealed, 297 U.S. 650-56, 80 Law Ed. 956. This case is not in point unless the above corporation's business is exclusively interstate business. At page 960 (L. Ed.) the court said: "As it does not appear that any of the taxed income is allocable to intrastate commerce, the tax as a whole must fail." Also, the tax was levied in this case on gross receipts and not on par value of stock as mentioned in New Mexico statute.

We note the articles of incorporation of the above subject state the "nature of the business" includes broadcasting, soliciting advertising, dealing in bills receivable and bills payable, buying and selling merchandise, buying and selling stock in corporations and other things not expressly forbidden by the laws of the State of New Mexico. From this it particularly appears that it would be necessary for the "commission" {35} to determine if all the business that the subject corporation may be transacting is interstate commerce.

The question as to whether the above corporation is subject to a franchise tax assessment is answered in an able and very exhaustive opinion by Mr. Justice Brice in the case of Southern Pacific Company vs. State Corporation Commission of New Mexico, 41 N.M. 556, 72 Pac. (2d) p. 15. Quoting from page 558:

"Sec. 6. In making the assessment provided by this act there shall be excluded the property of any corporation situate without the State of New Mexico, or used exclusively in interstate or foreign commerce."

The proportion of the capital stock of the appellee, as a basis for taxation, was determined by the following formula: To the total value of appellee's property within and without the State of New Mexico was added the total gross receipts from its business for the year of 1934. In like manner to the value of its property in New Mexico was added the gross receipts from intrastate traffic of the corporation's business in New Mexico. The latter amount is .0218 per cent. of the former; and that per cent. of the total capital stock of the corporation was determined to be subject to the tax as "the par value of that proportion of its authorized and issued capital stock represented by its property and business in this state."

Domestic corporations, by other provisions of the act, are subjected to the same tax, so there is no claim of discrimination against appellee.

(1) The words "property and business in this state," as used in section 2 of the act, are construed by the State Corporation Commission to mean all property of appellee in New Mexico not used exclusively in interstate business, plus the total gross receipts from intrastate business therein; the sum of which represents the authorized and issued capital stock allocated to such corporation's property and business in New Mexico as a basis for the tax. This seems to be the legislative intent."

By reason of the foregoing, it is our opinion that the above corporation is subject to franchise tax assessment if you find from the corporation's report or reports that it has been conducting intrastate commerce.

By THOS. C. McCARTY,

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