

Opinion No. 45-4725

May 23, 1945

BY: C. C. McCULLOH, Attorney General

TO: Mr. J. Leon Miller, Director Income Tax Division Bureau of Revenue Santa Fe, New Mexico

{*76} I have your letter of April 30, 1945, wherein you request and opinion concerning the following two questions:

"1. Under our Statutes are we authorized to tax dividends received by a non-resident of the State of New Mexico from a domestic corporation in New Mexico?

"2. Are we authorized under our Statute to tax the profit on the net capital gain of stock held in a domestic corporation of New Mexico by a non-resident of this State?"

In view of the uncertainties under our present statute it is impossible to give a definite opinion concerning these two questions, and are, therefore, merely giving you an advisory letter concerning the possibilities of legally levying and imposing the tax involved under our statute.

Section 76-1201 of the 1941 Compilation levies a tax on every non-resident individual having a business or agency or engaged in the transaction of business in, into or from this state, **or deriving any income from any property within this state.**

The question principally involved is whether or not ownership of stock in a domestic corporation held by a non-resident outside the State of New Mexico is property within the State of New Mexico, within the contemplation of our statute. It has long been considered that stock in a corporation had a situs at the domicile of the owner and, therefore, it would appear, upon a reading of numerous cases, that stock must be {*77} considered as property located at the domicile of the owner, and not property within the state where the corporation is organized.

However, it is doubtful whether this rule is binding on tax authorities. See State Tax Commission of Utah v. Aldrich, 316 U.S. 174, 62 S. Ct. 1008. In this case the Utah statute provided in part as follows:

"The value of a gross estate of a decedent shall be determined by including the value at the time of his death of all property, real or personal, within the jurisdiction of this state, and any interest therein. * * *"

It is noted that this tax was based upon property located within the state, the same as our Income Tax taxes income from all property located within the state. Under the Utah statute the Supreme Court of the United States confirmed the levying of a tax held by a

non-resident of Utah on stock which such non-resident owned in a Utah corporation. This case would seem to be directly in point in theory. Further, as to the power of a state to levy such a tax, see *International Harvester Company v. Wisconsin Department of Taxation*, 322 U.S. 435.

By HARRY L. BIGBEE,

Asst. Atty. General