

## Opinion No. 52-5508

March 10, 1952

**BY:** JOE L. MARTINEZ, Attorney General

**TO:** Chairman, State Corporation Commission Santa Fe, New Mexico. Attention Franchise Tax Department.

{\*220} This office has had under advisement for a considerable period of time the question of the correctness of the franchise tax assessment for the year 1951 against the Chicago, Rock Island & Pacific Railroad Company.

An informal hearing was held in this matter before former Commissioner Eugene Allison, with Mr. Eaton Adams, Assistant General Counsel of the Rock Island, with Mr. William Federici of the firm of Seth & Montgomery and with Mr. Zinn of this office. At that meeting it was agreed that every effort would be made to reexamine the assessment made by the Corporation Commission -- Franchise Tax Department -- to determine whether a more favorable reassessment should be made as claimed by the taxpayer.

The attorneys for the Rock Island Railroad contended, and the facts support the conclusion, that the capital stock structure of the Rock Island Railroad was ordered and prescribed by the Interstate Commerce Commission upon a reorganization of the old railway company which was in bankruptcy. The attorneys also contend that the value properly assigned to the no par value stock of the Rock Island Company by the Corporation Commission should be the same as the stated value of \$ 100. per share required by the reorganization orders.

The assessment by the Franchise Tax Department and by the Commission was based upon the total business and property of the railroad for the year and upon the total authorized capital stock issued. In addition they took into consideration the \$ 89,000,000. surplus shown on the general balance sheet of the railroad.

The Corporation Commission, by the terms of Section 54-1205 New Mexico Statutes Annotated 1941 is given the authority in assessing the franchise tax for foreign corporations, to determine the value of no par stock. This section states:

"The capital stock of foreign and domestic corporations for profit having no fixed par value shall be presumed to have a par value of one hundred dollars (\$ 100.00) per share, but such value shall be subject to examination and revision by the state corporation commission from the information contained in the report by the said corporation, as herein provided, and from any other information obtained by the corporation commission, but in no event shall such value be less than as shown on the books of the said corporation. . . ."

In the instant case the attorneys for the railroad contend that the Corporation Commission did not go far enough in its search for information. The franchise tax report and the accompanying balance sheet are concededly the only sources of information relied upon in making the assessment.

The briefs of counsel for the railroad setting forth excerpts {\*221} from the reorganization proceedings of the I.C.C., as well as the railroad's certificate of incorporation fail to provide any information to require the State Corporation Commission to believe that the \$ 89,671,964.15 surplus shown on the company's general balance sheet is in any way pledged or earmarked so as not to be a true surplus which would accrue to the benefit of the stockholders in the event of liquidation.

It is obvious that the surplus is a credited surplus; nevertheless in the absence of any showing that it could not be considered in determining the value of the no par stock it must be taken into consideration by the State Corporation Commission.

It is my opinion that the assessment as made for the year 1951 was correct.