

Opinion No. 57-07

January 23, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General Joel B. Burr, Assistant Attorney General

TO: Mr. Ingram B. Pickett, Commissioner, State Corporation Commission, Santa Fe, New Mexico

QUESTIONS

QUESTIONS

Is a trust corporation, holding property for pension purposes under pension plans of companies exclusively, exempt from payment of the New Mexico franchise tax imposed by § 51-13-2, N.M.S.A., 1953 Compilation?

CONCLUSION

Yes.

OPINION

ANALYSIS

The Silver Avenue Building Corporation is incorporated under the New Mexico General Corporation Law. It was assessed and paid franchise tax for 1956. On September 14, 1956, the Articles of Incorporation were amended as follows:

"III. The general nature of the business to be transacted by this corporation and the purposes for which it is organized are as follows:

To purchase or otherwise acquire real property and any improvements thereon whatever located, or title to such property, and to exercise or cause to be exercised any and all such powers as may be incident to the conservation thereof; to sell, transfer, convey and lease any such property; to collect or cause to be collected the rentals and any other income thereon; and to turn over the entire amount thereof, less expenses, to an organization which itself is exempt from federal income tax."

The tax exempt organization referred to in the above amendment is three pension trusts, the Trustee of each of which is J. P. Morgan and Company, Inc., of New York. The pension trusts are those established by the Continental Oil Company, the Kennecott Copper Corporation and the Niagara Mohawk Power Corporation. All three pension trusts have qualified under § 401 (a) of the 1954 Code and § 165 (a) of the 1939 Code, and are exempt from federal income tax under § 501 (a) of the 1954 Code.

To qualify as an exempt pension trust under the provisions of § 401 (a) of the Internal Revenue Code of 1954, a trust must be created or organized in the United States as part of a pension plan of an employer for the exclusive benefit of his employees or their beneficiaries. There must be no discrimination in favor of employees who are officers, shareholders, persons whose principal duties consist in supervising the work of other employees, or highly compensated employees. Such a trust is required under United States Treasury Regulations to file annual reports with the Internal Revenue Service setting forth its annual receipts and disbursements as well as other information relative to its operations under the pension plan.

Section 501 (c) (2) of the 1954 Internal Revenue Code provides that, "Corporations organized for the exclusive purpose of holding title to property, collecting income therefrom, and turning over the entire amount thereof, less expenses, to an organization which itself is exempt", shall under § 501 (a) be exempt from federal income tax. Assuming that the Silver Avenue Building Corporation will, on the basis of its Amended Certificate of Incorporation, make application for a ruling of tax exemption under the provisions of § 501 (c) (2), a favorable ruling should be forth-coming.

Section 51-13-2, N.M.S.A., 1953 Compilation, imposes a franchise tax upon "Every domestic or foreign corporation for profit engaged in any business in this state, . . ." The term "domestic corporation for profit" is defined in § 51-13-1 as follows:

"The term 'domestic corporation for profit' means any corporation, joint stock company or association organized under the laws of the state of New Mexico except . . . those corporations organized and conducted for religious, charitable, educational or social purposes, and not for profit."

Under the above provision, if the Silver Avenue Building Corporation can be considered a corporation organized and conducted for charitable purposes and not for profit, it is exempt from the franchise tax.

The question of whether a pension trust or a corporation, whose purpose is to collect income for a pension trust, are charitable organizations for purposes of the franchise tax exemption has never been before the courts of this state. Nor has this office ruled on this particular question.

The Supreme Court of California, however, in *Re Tarrant's Estate*, 38 Cal. 2d 42, 237 P. 2d 505, (1951), held that a pension trust established by the Canadian Pacific Railway Company, a pension fund of the Great Northern Railway Company, and a pension fund administered by the Railroad Retirement Board were charitable organizations and thus were proper recipients of a testamentary bequest under a California statute which limited the making of testamentary dispositions to those corporations organized solely for charitable purposes. In defining the scope of the word "charity", the Court said that "The scope of the word 'charity' changes and enlarges with the needs of men and must advance with the progress of civilization so as to encompass varying wants of humanity properly coming within its spirit."

As to what constitutes a charitable purpose, the Restatement of Trusts states at § 368, Comment a:

". . . The common element of all charitable purposes is that they are designed to accomplish objects which are beneficial to the community."

Industrial pension trusts may properly be said to accomplish objects which are beneficial to the community and under the above definition, could be considered a charitable organization.

In *Harrison v. Barker Annuity Fund*, 90 F.2d 286 (C. C. A. 7th, 1937), the Court was concerned with the question of whether an industrial pension trust was a charitable organization so as to qualify for exemption under a provision of the Internal Revenue Code. The Court concluded that the trust was entitled to exemption and said at page 288 of its opinion:

"Under this law, in view of the fact that bequests for public purposes operate in aid of good government and perform by private means what ultimately would fall upon the public, exemption from taxation is not so much a matter of grace or favor as rather an act of public justice."

The elements taken into consideration in the formulation of the plan for eligibility and distribution in the pension plan in the above case, were years of service, age, marital status, and the offspring of the recipients. The beneficiaries, to qualify, must have reached the ordinary allotted span of life, and the annuities constituted supplementary aid "in their old age" in the nature of rewards for fidelity, steadfastness and persistence in industry. The Court said that the effect of such action was to "encourage, generally, among employers, the desire to promote similar rewards for the qualities mentioned, and among employees, industry, persistence of effort, and loyalty. Clearly such purposes are charitable as Congress has used the word in the exemption statutes, as the courts have construed the same." The Court went on to state that the purpose of the plan "was praiseworthy and the inevitable effect the encouragement and promotion of habits upon the part of employer and employees, tending to the greater good of the body politic. . ." See also *Eagen v. Commissioner of Internal Revenue*, 43 F.2d 881 (C. C. A. 5th, 1930), and an annotation of all existing cases in 28 A.L.R. 2d 419, (1951).

The author of the A.L.R. Annotation, cited above, reviews all existing cases and concludes with the following summary:

". . . Therefore it seems but logical to conclude that any pension plan or fund calculated to confer ordinary retirement, disability, or similar benefits upon the employees of a private concern or industry, not shown to be so restricted in numbers as to constitute a purely private trust, may be construed to be for the benefit of persons in need, within the requirement of a 'charitable purpose' . . ."

This office is impressed with the reasoning of the above cited authorities, and in the absence of a decision by our Supreme Court on this subject, concludes that industrial pension trusts, which qualify for exemption under the federal income tax laws, are designed to accomplish objects which are beneficial to the community and are established for the exclusive benefit of retired and disabled employees. They should, therefore, be exempt from the franchise tax.

It therefore follows that the Silver Avenue Building Corporation, whose sole purpose, as specified in its Articles of Incorporation, is to hold title to real property, collect the income therefrom, and pay over its entire income to organizations which we feel are charitable wherein the meaning of the franchise tax exemption statute, should be exempt from payment of any franchise tax imposed by this state.