

Opinion No. 62-81

July 5, 1962

BY: OPINION OF EARL E. HARTLEY, Attorney General J. E. Gallegos, Assistant Attorney General

TO: Mr. Abner Schreiber, Assistant District Attorney, First Judicial District, Los Alamos, New Mexico

QUESTION

QUESTIONS

1. May Los Alamos County require the First National Bank of Santa Fe to submit a return of its property located and used within the County of Los Alamos as of January 1st of the taxable year?
2. Is property of that bank taxable directly by the County of Los Alamos?
3. Is the County of Los Alamos entitled to a proportionate distribution of the assessment against that bank's stock made by the Tax Commission?
4. May a municipality provide by ordinance for the payment of an occupation tax by a National Bank?

CONCLUSIONS

1. and 2. See analysis.
3. No.
4. No.

OPINION

ANALYSIS

The First National Bank of Santa Fe is a National Bank organized under Congressional authority which is codified in 12 USCA, Section 21 et seq. It maintains a branch bank in Los Alamos County which does a substantial volume of banking business and contains valuable furniture, machines and other equipment. The questions presented pertain to taxation of the property and the business of that branch bank.

1 AND 2. RETURN OF PROPERTY AND TAXATION THEREOF:

Taxation of National Banks, with the exception of their real property, involves an excursion into a restricted area. The general tax laws of the State are inapplicable. A few specific laws of New Mexico and of the United States control.

National Banks are agencies of the United States created under its laws to promote its fiscal policies, and their property can be taxed only with the consent of Congress and in the manner Congress provides. **Iowa - Des Moines National Bank v. Bennett**, 284 U.S. 239, 76 L. Ed. 265; **First Nat'l Bank of Guthrie Center v. Anderson**, 269 U.S. 341, 70 L. Ed. 295; **First Nat'l. Bank of Albuquerque v. State Tax Comm.**, 43 N.M. 307, 92 P. 2d 987. Congress has consented to state taxation of National Banks and set forth four methods for doing so in 12 USCA, Section 548. That law, in pertinent part, reads as follows:

"The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

1. (a) the imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause. . . .

* * * *

3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed."

The first method, which is to "tax said shares", has been adopted by New Mexico, §§ 72-2-4 and 72-2-6, N.M.S.A., 1953 Compilation. Adoption of one of the four methods excludes the remainder by the express terms of the Federal statute.

Real property of National Banks is taxable by the State where situated just as any similar privately owned property, in accordance with the exceptions in both § 72-1-5 and 12 USCA, 598. **First Nat'l. Bank of Albuquerque v. Albright**, 13 N.M. 514, 86 P. 548.

However, the personal property of a National Bank is exempt from direct assessment and taxation because (1) Congress has not permitted it to be taxed and (2) it is included in the valuation of shares of stock assessed to the stockholder. This was the conclusion in Attorney General Opinion No. 4858 issued February 18, 1946. It is also the holding of numerous cases, e.g., **Rosenblatt v. Johnston**, 104 U.S. 462, 26 L. Ed. 289, 359 P. 2d 625; **Security First Nat'l. Bank v. Franchise Tax Bd.**, 11 Cal. Rept. 289, 359 P. 2d 625.

All property subject to taxation should be declared by the owner as of the first day of January of each year. §§ 72-2-1 through 72-2-14, N.M.S.A., 1953 Compilation. Therefore, we answer Questions No. 1 and No. 2 by simply stating that Los Alamos County can require the First National Bank of Santa Fe to declare any real property it owns within Los Alamos County, as that property declaration of personal property, is taxable; it can require no such for that property is not taxable.

3. APPORTIONMENT OF ASSESSMENT ON BANK SHARES:

The next question involves apportionment of the assessment on a National Bank's stocks between or among the counties where it has offices. The particular facts raising the question show, as we have said, that the Santa Fe Bank does considerable business through its branch in Los Alamos. However, one should keep in mind at the outset that the New Mexico tax on a National Bank is imposed on an intangible. It is the shares of stock -- evidence of ownership of the bank -- that are taxed and not property, volume of business nor any such tangible item.

The answer to this question requires close examination of §§ 72-6-4 and 72-6-6, supra. They read, in pertinent part, as follows:

"72-6-4. **Assessments by Commission** -- at its regular meeting beginning on the first Monday of March of each year, the commission (1) shall determine the actual value: . . . (b) of the shares of the capital stock of all banks, trust and mortgage loan companies incorporated under the laws of the United States or of this state: . . . (2) shall certify: . . . (c) **To the local assessor in the respective counties in which each of the companies enumerated in 1 (b) is situated**, the value of the shares of such companies, found and determined as hereinafter provided; (3) The actual value so determined, when certified by the commission, shall be final and binding upon all tax officials of the state. Each assessor shall place the actual **values so certified upon the assessment roll of his county** for the year for which determined, **and taxes shall be levied thereon in the same manner as in case of other property.** . . ." (Emphasis supplied.)

"72-6-6. **Method of Valuing Shares of Banks, Trust Companies and Mortgage Loan Companies.** -- (1) The stockholders of every bank, trust or mortgage loan company in this state, organized under the laws of this state, or of the United States, **shall be assessed and taxed on the value of their shares of stock therein, in the county, school district, city, town or village, where such bank, trust or mortgage loan company is located**, whether such stockholders reside in such place or not, and shall be assessed in the name of the bank, trust or mortgage loan company, as the agent of the stockholders. . . ." (Emphasis supplied)

Under 12 USCA Section 548 the Legislature of each State is to designate the situs of taxation of National Banks shares. What situs is designated in the above statutes?

The statutes use the word "situated" (§ 72-6-4) and "located" (§ 72-6-6) in talking about where the value of the shares will be placed on rolls (§ 72-6-4) and where they will be taxed (§ 72-2-6). In each case the reference is clearly to the bank. The statutes are not phrased in terms of where the personal property of the bank is located nor where the conduct of business occurs.

As a general rule, a reference to the place a corporation is "located" or "situated" means its corporate domicile; where it has its principal office. **Carter v. Spring Perch Co.**, 113 Conn. 636, 155 A. 832; **San Jacinto Nat'l. Bank v. Sheppard**, Tex. Cir. App., 125 S. W. 2d 715. More specifically, the term "located" in reference to National Banks is held to mean its place of operation as specified in its organization certificate filed in compliance with 12 USCA Section 22. **City of Passaic v. City of Clifton**, 23 N.J. Super. 333, 93 A. 2d 17 ("location" under New Jersey statute providing for tax on shares of bank stock); **Raila v. Los Angeles First Nat'l. Trust**, 133 iMsc. Rep. 630, 233 N.Y.S. 501 (action against National bank where "located" authorized by 12 USCA § 94).

The First National Bank of Santa Fe has its principal office in Santa Fe, Santa Fe County. That is also the place of operation designated by its organization certificate.

Section 76-231, N.M.S.A., 1941, formerly provided that the "property" of a business which operated in more than one county should be listed and taxed in the county where existing. Section 76-233, N.M.S.A., 1941, formerly provided that the "property" of every corporation should be assessed in the county "where the property is situated." Both of these acts were repealed by Chapter 154, Laws 1953, Section 9 and no substitute provision was enacted to replace them.

Had not the Legislature repealed the above mentioned acts there would be ground for argument that the situs in question should be divided between or among the counties where the Santa Fe Bank holds property and does business, thus resulting in an apportionment of the assessment to Los Alamos County. However, the meaning the cited authorities ascribe to "location" of the bank and the action of the Legislature in repealing former Sections 76-231 and 76-233, supra, lead to an inevitable conclusion. The entire taxable value of National Bank shares under our law is given a situs in the single county wherein is located its principal office designated as such in its organization certificate.

Therefore, there should be no apportionment of the assessment on the shares of the First National Bank of Santa Fe. The shares should be assessed and taxed only in Santa Fe County.

Though not directly in point because of the different State tax laws involved, an analogous case in support of our conclusion is **Nat'l. City Bank of New York v. Domenech**, Cir. 1, 71 Fed. 2d. 13, aff'd. 294 U.S. 199, 79 L. Ed. 857. The National Bank there had its home office in New York City and designated that City as its place of operation under 12 U.S. CA § 22. The Bank was carrying on business and maintaining property at a number of branch banks in Puerto Rico. An attempted tax by Puerto Rico

on the Bank's shares based on the portion of total capital which was employed in that territory was held to be unauthorized. The Court said this was so "for the very good reason that the banking association **was not located** in Puerto Rico and consequently the shares were not there so that it could impose a tax on them." (Emphasis supplied).

Of interest and pertinence is the development of the law in Arizona relative to the tax situs of National Bank shares. In 1893 the Legislature, by Act No. 85, adopted a provision for taxing such shares which read almost exactly as does our § 72-6-6, supra; the stocks were to "be assessed and taxed in the county where such bank or banking association, or corporation is located for the transaction of business." Then in 1909, by Chapter 27, Section 10A, the Arizona Legislature added the provision that for assessment purposes the bank would be considered "as located in any and every county wherein it has, located an office for the purpose of carrying on a banking business . . ." See Ariz. Code 1939, Sections 73-204 to 73-207. The reason for the 1909 provision being enacted was stated in **Valley Nat'l. Bank v. Apache County**, 57 Ariz. 459, 114 P. 2d. 883 at 885:

"When, however, branch banking came into vogue it was quickly seen that it would be unfair that one community should receive all the taxes on the capital stock of a bank when its earnings and value were in reality based upon its operation in many places. The legislature, therefore adopted chapter 27 of the Laws of 1909, Section 10A . . ."

From this we see that the Arizona Legislature was convinced, and its Supreme Court agreed, that the law making bank shares taxable where the "bank . . . is located . . ." resulted in a tax situs in only the county of the bank's principal office. Arizona therefore took the further legislative step, which New Mexico has not done, and apportioned the tax situs among the counties where the bank carried on business.

We observe that recently the Arizona law providing for assessment of a bank's shares of stock has been superseded by Section 42-901, et seq. A.R.S., providing for tax on income of banks doing business in that state.

4. IMPOSING CITY OCCUPATION TAX ON A NATIONAL BANK:

This brings us to the final question of whether a municipality may provide by ordinance for the payment of an occupation tax by a National Bank.

It is uniformly held that neither a state nor a subdivision thereof can impose a franchise or so-called license tax on a National Bank. **Second Nat'l. Bank v. Caldwell**, 13 F. 429; **Bank of America v. Lima**, D. Mass., 103 F. S. 916; **City of Shelbyville v. Citizens Bank**, 272 Ky. 559, 114 S.W. 2d 719; **Bank of California v. Portland**, 157 Or. 203, 69 P. 2d 273. The reason for this rule is the proposition earlier stated that National Banks are to be taxed in no other manner than that specifically provided by Congress in 12 USCA § 548; **Iowa - Des Moines Nat'l Bank v. Bennett**, supra; **First Nat'l. Bank v. Anderson**, supra.

An occupation tax is imposed on the prosecution of a business as opposed to a franchise or license tax which is imposed on the privilege of engaging in the business. **Tharp v. City of Clovis**, 34 N.M. 161, 279 P. 69; **State v. Old Abe Co.**, 43 N.M. 367, 94 P. 2d 105; Black's Law Dictionary, 4th Ed. Nonetheless, the reason for the rule holding franchise taxes on National Banks invalid is equally applicable to occupation taxes. Such taxes simply are not authorized by Congress and would present an obstruction to the exercise of the bank's corporate powers which are defined by the Federal law. In **Austin v/ City of Seattle**, 176 Wash. 611, 30 P. 2d 647, this principle was recognized in dicta.

We are therefore, of the opinion that a city occupation tax on National Banks would transcend the authority of the state, and its subdivisions, to tax National Banks and would be invalid.