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BY: OPINION OF EARL E. HARTLEY, Attorney General Norman S Thayer, Assistant Attorney General

TO: Charles C. Brunacini, Commissioner of Revenue, Bureau of Revenue, Santa Fe, New Mexico

QUESTION

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1. Does the state income tax apply to dividends received on shares of stock in national banks?

2. Does the state income tax apply to dividends received on shares of stock in state banks?

CONCLUSIONS

1. No.

2. Yes.

OPINION

ANALYSIS

This opinion deals with the income tax liability of the shareholders, not the banks themselves. Banks, both state and national, are exempt from payment of the state income tax under Section 72-15-31 and 72-16-31.1, N.M.S.A., 1953 Compilation.

Title 12, U.S.C.A., Section 348, provides for the taxation of national banks by a state. Four types of taxes are permitted, but the statute expressly declares that the imposition of any one of them shall be in lieu of any of the others. The states are allowed to (1) tax the shares of stock in the bank, (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, (3) tax the banks on their net income, or (4) tax the banks according to or measured by their net income.

Under Section 72-6-6, N.M.S.A., 1953 Compilation the state imposes a tax on the shareholders of both state and national banks on the value of the shares of stock. While the tax is imposed on the shareholders, such taxes have been held to be taxes on the shares of stock, and the imposition of such a tax has been held to preclude the imposition of an income tax on the dividends declared on the stock. In other words, our tax comes within the first option available to the states for taxation of national banks. See **First National Bank in St. Louis v. Buder,** 8 F.2d 883; **State Revenue Commission v. Hawkins,** 172 S.E. 845; and **Johnson v. Meagher County,** 155 P. 2d 750.

Having adopted a tax on the shares, the state is prohibited from levying an income tax against the dividends declared on those shares. It is, therefore, our opinion that the state income tax does not apply to dividends received on shares of stock in national banks.

No such general statutory prohibition exists with respect to dividends declared on shares of stock in state banks. Shares of stock in state banks are subjected to the same tax under Section 72-6-6, supra, as are shares of stock in national banks. Imposition of an income tax on dividends on shares of stock in state banks will result in imposing a greater tax burden on state banks than on national banks. While this result is to be avoided if possible, we should make it clear that the imposition of an income tax does not result in double taxation of stockholders in state banks. If a state bank declares dividends, the amount of the dividends is not included within the formula provided under section 72-6-6, supra, for taxation of the value of the shares. Therefore, the dividends have not been taxed. If the state bank does not declare dividends, the amount that would otherwise have been distributed as dividends is included within the formula prescribed by Section 72-6-6, supra, but then, of course, there is no income to shareholders on which any tax is imposed.

Nothing in the state income tax act itself, Section 72-15-1 through 72-15-48, N.M.S.A., 1953 Compilation, contains an exemption for dividends declared by state banks. Section 72-15-3 (k), defining "dividend," does not exclude bank dividends. More persuasive still are the requirements of Section 72-16-17. That section requires financial institutions, among others, having a place of business in this state, and having the control, custody, receipt, disposal or payment of interest, rent, salaries, wages, premiums, **dividends,** annuities, compensations, remunerations, emoluments, or other fixed or determinable gains, to file annual information returns with the Bureau of Revenue. It would be strange for the income tax act to require information returns of the dividends declared by financial institutions unless those dividends were taxable. This, of course, is only evidence of the taxability of state bank dividends. The overriding factor is that the state income tax is imposed on dividends generally, and contains no exemption for dividends declared by state banks. Therefore, it is our opinion that the state income tax applies to dividends received on shares of stock in state banks.

That this imposes a greater tax burden on investors in state banks than on investors in national banks is clear. However, no discriminatory intent can be attributed to the legislature. Our legislature is simply prohibited, by federal law, from imposing the same tax on dividends declared by national banks. It is not discrimination for a state to exempt that which it has no power to tax.