

## Opinion No. 39-3006

January 25, 1939

**BY:** FILO M. SEDILLO, Attorney General

**TO:** Mr. J. O. Gallegos, Commissioner of Revenue, Santa Fe, New Mexico. Attention: W. S. Barnes, Auditor

{\*13} In your recent letter you inquire as to the taxability under Chapter 85, Laws of 1933, (141-1501, et seq., 1938 Supplement) of a resident individual who as a partner receives income from a partnership carrying on business without the state. You state that in a matter involving the succession tax we took the position that the interest owned in the partnership was in the nature of intangible property.

Under our statute a resident is, of course, taxable on his income from within as well as from without the state, and consequently the income of a resident partner from such a partnership without the state is taxable whether such resident partner is considered as joint owner of the property without the state, or only as the owner of an intangible interest in the partnership.

{\*14} If such resident partner is considered as having a direct ownership in the tangible property of the partnership without the state, that state could, of course, tax the income of the property in that state to the resident of this state, and if it is so taxed, he would be entitled to a credit in accordance with Section 24 of the Act providing that whenever a resident of this state has become liable to income tax to another state from sources without this state, he shall be entitled to a credit of not to exceed one per cent (1%) of such income.

Though for many purposes the property of a partnership is also considered as the property of the partners as individuals, for taxation purposes generally, a partnership is classed as a separate legal entity, 61 C.J. 218, and a member of a partnership on real estate is generally considered for succession tax purposes as the owner of personality only, which of course would be intangible. 61 C.J. 1674. In the limited time I have had for research I have not found income tax cases right in point, though there are such cases no doubt; but it would seem that if the partnership is considered as a separate entity owning the property of the partnership, and the partners as owning an interest in the partnership and not directly in the property, that interest necessarily is intangible property, just as the interest of a stockholder in a corporation is intangible property. If so, that interest, being tangible personality, has its situs in the domicile of the partner, and is taxable here as income from a source within the state, and not income from a source without the state. That being so, Section 24 of the Act would have no application.

It is my opinion that the latter is the correct view in the matter. I should point out that the income of partnerships is not taxed in this state separately from the income of its

members. See Section 32 of the Act. However, all partnerships are required to make a separate return in their separate legal capacity.

By: A. M. FERNANDEZ,

Asst. Atty. Gen.