

## Opinion No. 40-3492

March 26, 1940

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

**TO:** Mr. Earle Kerr, Director Income Tax Division, Bureau of Revenue, Santa Fe, New Mexico. Attention: Mr. W. S. Barnes, Chief Auditor

{\*143} In your letter of March 19, 1940, you inquire whether or not the amendments made by Sections 2 and 3 of Chapter 176, Laws of 1939, dropping deductions theretofore allowed by subsection (6) of Section 5, Chapter 85, Laws of 1933, for compensation received from the federal government by officials or employees thereof, and also deductions theretofore allowed by subsections (k) and (o) of Section 7, Chapter 85, Laws of 1933, for dividends on bank stock and one thousand dollars for every corporate taxpayer, are effective for the entire year of 1939 or only from the date this 1939 law was approved by the Governor. These amendments merely reenact each of said sections without the above provisions for deductions. This amendatory statute was approved by the Governor on March 16, 1939, and went into effect on that date by reason for the emergency clause therein contained.

In my opinion bank stock dividends and federal salaries theretofore deductible are now taxable only from the 16th day of March, 1939, but that the one thousand dollar corporation deduction, being allowable in bulk at the end of the taxable year out of any income received in any part of the year, is in the nature of an exemption which accrues at the end of each taxable year, and that it cannot be allowed, therefore, for any taxable year which ended subsequent to March 16, 1939, when the statute withdrawing the allowance of such deductions went into effect.

At first, I was inclined to the belief that as to all three of these deductions the right thereto, like the right to the one thousand dollar corporate deduction, accrued at the end of the taxable year, and that the statute at its passage was applicable to the then current year as to all of them. In the discussions which we have had, it was suggested that if so construed it would be in effect the taxing of income already earned at the passage of the law, and that this made the Act retroactive. After reflection, I am inclined to agree with this view insofar as the bank stock dividends and federal compensation deductions are concerned, but not as to the one thousand dollar corporation deduction. It was also suggested in discussion and in the letters from taxpayers, (1) that there was nothing in the statute indicating an intent to make the Act retroactive, and that in the absence of such clear intention it should be construed as prospective only; (2) that on the contrary the emergency clause indicated that the legislature considered it as prospective only and enacted the emergency clause to make those provisions applicable as early as possible; and (3) that if it were interpreted as {\*144} retroactive, it would be invalid as interfering with vested rights.

I cannot agree with the last two points. As to the power of the legislature, it has been clearly established that with respect to income taxes, laws may be validly enacted and made retroactive. See 33 C.J. 288, Internal Revenue, Section 36, and the cases there listed dealing with income taxes. As to the emergency clause, the legislature might well have considered it proper by reason of other provisions in the Act such as the exemptions mentioned in Section 6, the filing of certain returns mentioned in Sections 7 and 8, etc. The legislature is the sole judge of what it considers an emergency. Therefore the emergency clause is no criterion.

Considering the intent of the legislature you point out that Section 1 of Chapter 85, Laws of 1933, provides for income tax to be levied "for each and every year thereafter," etc., that the general application of income taxes is on a yearly basis, that the amendments in question were made by reenacting certain sections directing the matter of calculation of the income, leaving out the allowance of the above deductions, and that in adopting those amendments the legislature evidently had in mind the taxable year as a whole and legislated with respect to the then current and subsequent and taxable years as a whole. This is logical and reasonable and would have great force under ordinary rules of interpretation.

However, with respect to tax statutes imposing a liability if given a retrospective effect which would not result if given a prospective interpretation only, the rule that statutes are to be considered as prospective only unless expressly or by clear implication the contrary appears applies with greater force. The rule as to this class of statutes is stated in 33 C.J. 288 to be that "they should be construed to apply only to future cases, unless they are made by clear and explicit language to embrace past transactions," and that "presumption against retrospective effect is resistless except against an intention imperatively clear."

Since the language in Section 1 of Chapter 85, Laws of 1933, above mentioned refers to the taxable year which may be a calendar or a fiscal year, a construction of the statute as including at the time of its passage all of the then current taxable years would result in taxing bank stock dividends and federal wages as to some taxpayers for periods of time prior to March 16, 1939, and not taxing such income as to other taxpayers for exactly the same periods, all depending on the time covered by the year used on the part of each for income tax purposes. One using the calendar year would be taxed for such income accruing in January and February, yet another whose fiscal year started the first of March would not be. For these reasons, and because of the rule above stated, I am of the opinion that as to these two items liability begins from March 16, 1939.

The same is not true, however, of the one thousand dollar deduction, which as stated above is not allocable to any particular period, but accrues as a flat exemption at the end of the taxable year. Exemption should be strictly construed in favor of the state. As to that, my opinion is that the Act is prospective only, and that the whole exemption is withdrawn from all incomes for taxable years ending at any time subsequent to March 16, 1939.

By: A. M. FERNANDEZ,

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