

Opinion No. 41-3739

March 14, 1941

BY: EDWARD P. CHASE, Attorney General

TO: State Corporation Commission Franchise Tax Department Santa Fe, New Mexico.
Attention: Diego R. Gonzales, Chief Clerk

{*46} Your letter dated March 13, 1941, requests an opinion by this office as to whether or not a corporation may, upon filing Franchise Tax Report, deduct the value of its treasury stock from the value of its issued capital stock, thereby reducing the franchise tax assessment.

Sections 3 and 4 of Chapter 116, Laws of 1935, provide that a franchise tax shall be paid "at the rate of ONE (\$ 1.00) DOLLAR on each ONE THOUSAND (\$ 1,000.00) DOLLARS, or fraction thereof of the par value of that proportion of its **issued** capital stock, * * *".

This New Mexico law seems to {*47} have been copied directly from the New Jersey law (Title 54, Pages 66 to 71, Revised Statutes of New Jersey, 1937). The New Jersey law provides that the franchise tax shall be levied on the capital stock **issued and outstanding**.

The courts of that state, in construing the statute and the word "outstanding," have held that a corporation is liable for the franchise tax on its own stock which it has bought and held in its treasury. The court said in Knickerbocker Importation Company vs. State Board of Assessors, et al., 71 N. J. L. 583, 65 Atl. 913, 9 L.R.A. (NS) 885: "Stock once issued is and remains outstanding until retired and cancelled by the methods provided by statute for retirement and cancellation of capital stock."

A fortiori since the New Mexico Legislature saw fit to omit the word "outstanding," I am of the opinion that all capital stock issued, whether all of the same is held in the company treasury as treasury stock or not, which stock has not been retired and cancelled in accordance with the provisions of our statutes, is taxable under the New Mexico Franchise Tax law.

Trusting that the foregoing answers your question, I am

By George H. Hunker, Jr.

Asst. Atty. General