Opinion No. 41-3931

October 24, 1941

BY: EDWARD P. CHASE, Attorney General

TO: Mr. Don R. Casados, Chairman State Corporation Commission Santa Fe, New Mexico

*{*114}* You have submitted the file in connection with the franchise tax of the A. T. & S. F. Railway Company insofar as the same covers subsidiary or affiliated companies, and also you have submitted the correspondence from J. E. Owens, Tax Agent, in which he contends that the A. T. & S. F. Railway Company is not liable for franchise tax based upon the shares of capital stock of the affiliated companies.

In its annual report to the State Corporation Commission, the A. T. *{*115}* & S. F. Railway Company and its affiliated companies show the following authorized and issued capital stock:

Year, 1941, Name, Atchison, Topeka & Santa Fe Ry. Co., Authorized Stock, $ 406,795,330, Issued Stock, $ 366.878,800.

Year, 1941, Name, Alkart & Santa Fe Ry. Co., Authorized Stock, $ 50,000, Issued Stock, $ 50,000.

Year, 1919, Name, New Mexico Central Ry. Co., Authorized Stock, $ 500,000, Issued Stock, $ 410,900.

Year 1919, Name, Rocky Mountain & Santa Fe Ry. Co., Authorized Stock, $ 6,500,000, Issued Stock, $ 6,500,000.

Total Authorized

Stock $ 413,845,330

Total Issued

Stock $ 373,839,700

Mr. Owens, in his letter, states that the capital stock of the three affiliated companies is owned by the A. T. & S. F. Railway Company and that the property of these companies is leased and operated by the A. T. & S. F. Railway Company. You state also that the corporate charter to do business in New Mexico is still in existence for all of these companies.

The question involved is whether the shares of capital stock of the three affiliated companies is subject to payment of a franchise tax under the provisions of Chapter 116, Laws of 1935, and if so, whether the A. T. & S. F. Railway Company is liable for such tax.

There are a number of Federal cases construing the Internal Revenue Act of 1909 in which the Federal Courts and the United States Supreme Court have held that the tax imposed under the Federal Act, which is similar to our state franchise tax act, can only be imposed against a corporation which is actually carrying on or engaging in the business for which the corporate charter was primarily granted. However, in these cases the courts also hold that the corporation leasing its property and not engaging in business is not liable for such tax, that, on the other hand, the lessee which is engaging in business and using the corporate property is liable for the tax. This is illustrated in the language used in the case of Mine Hill and S. H. R. Co. vs. McCoach, 192 Fed. 670, 228 U.S. 295, as follows:

"For the present, it seems to be enough to say that the Reading Railway, and not the plaintiff, is doing the corporate business originally entrusted to the plaintiff, **and presumably is also being taxed for carrying it on.** It seems hardly possible that both corporations can be taxed in respect of transporting the same freight and the same passengers."

And in the case of Jasper and E. Ry. Co. vs. Walker, 238 Fed. 533, we find this language:

"The result of exacting payment of the tax by the plaintiffs in error would be to hold them to liability, not because they were engaged in or carrying on business, but because of the ownership and maintenance of leased property used in carrying on business only by another corporation, **which thereby subjected itself to liability for the tax."**

In the case of State vs. Old Abe Company, 43 N.M. 367, 94 P. (2d) 105, the Court had under consideration Chapter 116, Laws of 1935, and construed said law to the effect that the franchise tax provided for may be collected only when a corporation against which the tax is assessed is engaged in the carrying on or doing business. *{*116}* In other words, as stated by the Court, it is "a tax on the privilege when exercised."

Under the construction of our Supreme Court and of the Federal Courts in cases involving the leasing of railroad properties by a corporation to another corporation, there seems to be little question but that the three affiliated corporations herein involved are not engaged in or carrying on business, and, therefore, that said corporations are not themselves liable for the franchise tax. However, the A. T. & S. F. Railway Company owns all of the capital stock of such corporations and, in addition, has leased the properties of such corporations and is operating the same or "carrying on or engaging in business with such properties."

For that reason, it seems to follow that in view of the authorities above cited, the A. T. & S. F. Railway Company is liable for the franchise tax computed upon the shares of capital stock of said corporations, based upon the valuation of the property and the gross receipts which are to be used as factors in determining the number of shares of said corporations that measures the tax.

By C. C. McCULLOCH,

Asst. Atty. General