

TAXATION AND REVENUE: Dividends received on national bank stock must be included in gross income for Missouri state income tax purposes.

November 21, 1946



Mr. M. E. Morris, Director
Department of Revenue
Jefferson City, Missouri

Dear Sir:

Reference is made to your letter of recent date, requesting an official opinion of this office, and reading as follows:

"It is requested that you please furnish this department with a written opinion, stating whether or not dividends received from National Bank Stock will be subject to Missouri state income tax in either the year 1946 or 1947."

The scheme for the taxation of incomes in Missouri is found as Article 21 of Chapter 74, R. S. Mo. 1939, as amended by House Bill No. 676 of the 63rd General Assembly. As a part thereof, a statutory definition of "income" has been incorporated. This definition is now found as Section 11345 of said House Bill No. 676, which reads, in part, as follows:

"Income shall include gains, profits, and earnings derived from * * * dividends * *"

From the plain wording of the foregoing portion of the statute quoted, dividends are to be included in the gross income of Missouri income taxpayers unless such dividends are exempt under further provisions of law.

Dividends paid on shares of national banking associations are, in effect, profits arising from the operation of a federal governmental instrumentality. As such federal governmental instrumentality, the entire power of the State of Missouri

to impose any taxes which might or could affect the operations thereof is controlled by the action of the Congress. With respect to national banking associations, the Congress has waived the immunity from taxation enjoyed by such instrumentalities through having passed what now appears as 12 U.S.C.A., Sec. 548, which reads, in part, as follows:

"The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

"1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause." (Emphasis ours.)

Subdivision (c), referred to above, reads as follows:

"(c) In case of a tax on or according to or measured by the net income of an association, the taxing State may, except in case of a tax on net income, include the entire net income received from all sources, but the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon mercantile, manufacturing, and business corporations doing business within its limits: Provided, however, That a State which imposes a tax on or according to or measured by the net income of, or a franchise or excise tax on, financial, mercantile, manufacturing, and business corporations organized under its own laws or laws of other States and also imposes a tax upon the income of individuals, may include in such individual income divi-

dends from national banking associations located within the state on condition that it also includes dividends from domestic corporations and may likewise include dividends from national banking associations located without the State on condition that it also includes dividends from foreign corporations, but at no higher rate than is imposed on dividends from such other corporations." (Emphasis ours.)

By the enactment of House Bill No. 888 of the 63rd General Assembly, the State of Missouri has availed itself of the authorization contained in the above quoted federal statute to impose a tax upon the shares of national banking associations. Section 3 of the bill mentioned reads, in part, as follows:

"A. Every national banking association shall be subject to an annual tax according to and measured by its net income in accordance with method numbered (4) authorized by the Act of Congress of March 25, 1926, amending Section 5219 of the Revised Statutes of the United States, * * *"
(Emphasis ours.)

You will note that through election by the State of Missouri to tax national banking associations in accordance with method numbered (4), the provisions of subdivision (c) of the federal statute, set out supra, become applicable. You will further note that the proviso contained in subdivision (c) specifically authorizes the inclusion in the individual income of taxpayers dividends received upon shares in national banking associations, provided two conditions are complied with:

- (1) That the state imposes a tax on or according to or measured by the net income of, or a franchise or excise tax on, financial, mercantile, manufacturing, and business corporations organized under its own laws or laws of other states; and
- (2) That the state also imposes a tax on the income of individuals.

Without specific citation of the numerous statutes relative to the taxation of the income of corporations of the type mentioned, and to the other statutes imposing franchise taxes upon such corporations, we note that the State of Missouri has

complied with the first condition. Again, without specific citation of the statutes relative thereto, we note that the State of Missouri also imposes a tax on the income of individuals, and thereby has complied with the second condition.

We have carefully examined the provisions relating to income which is exempted or may be excluded in computing the income tax of individuals under the Missouri law, and do not find that income of the nature under consideration has been specifically exempted. Further, that to not do so is the intent of the General Assembly may be inferred from the fact that Section 10960, R. S. Mo. 1939, did read as follows:

"That the tax provided in section 10959, R. S. 1939, is hereby declared to be the sole method of taxing national banking associations, their income, shares therein and dividends from such shares."

The tax previously imposed by Section 10959, R. S. Mo. 1939, has been changed to a new method, found in House Bill No. 888 of the 63rd General Assembly. In connection with such election to change the method of taxing the shares of national banking associations, the 63rd General Assembly has also passed House Committee Substitute for House Bill No. 469, which specifically repeals Section 10960, quoted supra. In neither H.C.S.H.B. No. 469 nor House Bill No. 888 has the exemption previously granted by the repealed Section 10960 been retained. We believe that the failure to so retain such exemption statute indicates an intent on the part of the General Assembly to subject dividends received on the shares of national banking associations to the Missouri state income tax, in accordance with the authorization granted in subdivision (c) of 12 U.S.C.A., Sec. 548, quoted supra.

The further condition found in subdivision (c) of 12 U.S.C.A., Sec. 548, that such dividends may be included in the income of individuals, provided that the state also requires the inclusion of dividends received from other corporations, is complied with, we believe, by reason of the fact that Article 21 of Chapter 74, as amended by House Bill No. 676 of the 63rd General Assembly, relating to the taxation of incomes, does require the inclusion of all dividends received from both domestic and foreign corporations. Also, the further requirement in the federal statute that the dividends of national banking associations, if so included in the income of individuals, must not be taxed at a rate higher than that imposed on dividends received from other

corporations, is complied with by the State of Missouri by virtue of the fact that the sliding scale of rates of tax provided under Article 21, Chapter 74, R. S. Mo. 1939, as amended by House Bill No. 676 of the 63rd General Assembly, is applicable to all taxable income, without regard to its source.

One further objection might be advanced against the inclusion of dividends received on shares in national banking associations in the income of individual taxpayers, by reason of the enactment of Section 11350, R. S. Mo. 1939. This statute, in substance, merely authorizes the income received as dividends from domestic or foreign corporations to be reduced proportionately to the tax paid on such earnings from which such dividends arose, upon which an income tax had been paid to the State of Missouri by the corporation as such. In view of the fact that national banking associations are not subject to taxation on their income, this provision works no inequality. It does not impose a tax at a higher rate upon income received as dividends on shares of national banking associations than it does upon income arising from dividends on shares in other domestic or foreign corporations.

The declared purpose of 12 U.S.C.A., Sec. 548, has been repeatedly stated to be that of protecting the capital invested in federal banking associations from discriminatory taxation, and to prevent the fostering of unequal competition with business of national banks by the use of such discriminatory taxation. See *Bedford v. Colorado National Bank of Denver*, 91 P. (2d) 469, followed in 98 P. (2d) 1120, affirmed 30 S. Ct. 800, 310 U. S. 41, 84 L. Ed. 1067; *Mercantile National Bank v. City of New York*, 28 F. 776, affirmed 7 S. Ct. 826, 121 U. S. 138, 30 L. Ed. 895. In the light of this declared purpose, we do not believe that requiring the inclusion in individual incomes of dividends received on shares of national banking associations would be violative of either the spirit or the letter of the federal statute, particularly in view of the specific authorization contained in subdivision (c) thereof.

The reasoning contained in the foregoing is, we think, applicable to the calendar year 1947 and subsequent years.

We note in your letter of inquiry that an opinion is also requested with respect to the calendar year 1946. This presents a somewhat different situation by reason of the fact that the operative date of House Bill No. 888 of the 63rd General Assembly has been fixed by the Legislature as July 1, 1946. This presents a situation in which a state statute will become

operative at a particular time during the tax year and will, by reason of change of method of taxing national banking associations, also make effective the provisions of the Missouri income tax law with respect to dividends received on shares in such banking associations. The questions remain, then: (1) Is it necessary that the Legislature reenact the income tax law to specifically extend its provisions to require the inclusion of such income, and (2) if such legislative action is not required, when will the provisions of the Missouri income tax law become effective?

This precise question was discussed at length in a case arising in Missouri. It is found as *Buder v. First National Bank of St. Louis*, 16 F. (2d) 990. Oddly enough, a somewhat similar situation to that now under consideration had resulted in Missouri by reason of the action of the Legislature in electing to assess an ad valorem tax on the shares of national banking associations. Prior to the Act of the Congress of March 4, 1923, which permitted either the taxation of income received as dividends on shares of national banking associations or an ad valorem tax upon the shares themselves, the only permissible method which states might employ was the latter. This, Missouri had done, and had also in force an income tax law which did not specifically exempt dividends received on shares in such banking associations, although taxation of such dividends was not permissible. After the passage of the Act of March 4, 1923, it was contended that the scope of the Missouri income tax act had thereby been extended to require the inclusion of such dividend income, and since the ad valorem tax on the shares was also still in effect, Missouri had thereby attempted to impose two of the permissible forms of taxation.

In *Buder v. First National Bank*, 8 F. (2d) 883, this contention of the bank had been sustained. On appeal to the Circuit Court of Appeals, 8th Circuit, reported 16 F. (2d) 990, the action of the District Court was reversed and the rule declared with respect to the necessity of reenactment of state statutes and the time when such statutes become effective:

"The question, then, is whether, when Congress by the act of March 4, 1923, permitted either form of taxation, but not both, the scope of the Income Tax Law of Missouri was thereby enlarged to include dividends upon shares of stock in national banks, so that that law destroyed section 12775 and itself. The lower court was of the opinion that the

act of Congress had that effect, citing the cases of Lionberger v. Rowse, 43 Mo. 67, and In re Rahrer, 140 U. S. 545, 11 S. Ct. 865, 35 L. Ed. 572.

"The first of these cases involved the question as to whether an early Missouri law taxing national banks, which contained provisions subsequently permitted by an act of Congress, could become effective unless re-enacted. The Supreme Court of Missouri, in disposing of the question, says:

"There is no force in the suggestion that, because the state tax law was passed prior to the provisions inserted in the congressional act, therefore it cannot be made to apply, but that a subsequent act must be enacted by the Legislature with direct reference to the law of Congress. If the law on our statute books attains the ends contemplated by the congressional enactment, and is not a violation or infringement thereof, it is of little moment at what particular day it was passed."

"The decision in the case was later affirmed by the Supreme Court (9 Wall. 468, 19 L. Ed. 721), but no reference was made to this question."

The court then discusses the case of In re Rahrer, 140 U. S. 545, in which a similar conclusion was reached, and thereafter the following appears:

"These cases indicate that the courts, in holding that state statutes include subjects not before included because of some congressional restriction or lack of permission, have done so for the purpose of carrying out, and not defeating, their intent and purpose, and to make them more, instead of less, effective. The correct rule, we think, is that, where a state enacts a law, general in its terms and intended to operate upon all subjects within its purview, but not fully effective because of some congressional inhibition or lack of permission, it becomes fully effective, without re-enactment, when that inhibition is so removed or permission

so given by Congress that it can become completely operative without destroying or impairing its effectiveness or defeating the intent of the Legislature which enacted it. * * * (Emphasis ours.)

Applying the rule announced above, although not strictly necessary to the determination of the question there involved, the court further said:

"If, on March 4, 1923, Congress had withdrawn permission for an ad valorem tax on shares of national banks, and had permitted an income tax on dividends, the Income Tax Law of Missouri would, by virtue of the rule referred to, have been expanded to include those dividends, without re-enactment. If Congress had permitted both an ad valorem tax on shares and an income tax on dividends, both laws would, no doubt, have been held to be effective. That would be because of the obvious intention of the state to tax shares as provided in section 12775, and also to tax all income which it could lawfully and effectively reach. * * *"
(Emphasis ours.)

Applying this to the matter under consideration, we reach the conclusion that upon the operative date of House Bill No. 888 of the 63rd General Assembly, the Missouri income tax act forthwith became effective to include within its scope dividends thereafter received on shares in national banking associations. We, therefore, believe that all of such dividends received subsequent to July 1, 1946, should be included in the return of Missouri income taxpayers for the calendar year 1946.

CONCLUSION

In the premises, we are of the opinion that for the calendar year 1947, and thereafter, dividends received on shares of national banking associations must be included in the gross income of individual taxpayers, and that without regard to whether such shares are in national banking associations located in Missouri or outside this state.

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We are further of the opinion that such dividends so received during the calendar year 1946, subsequent to July 1, 1946, must be included in the gross income of individual taxpayers for the calendar year 1946.

Respectfully submitted,

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APPROVED:

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