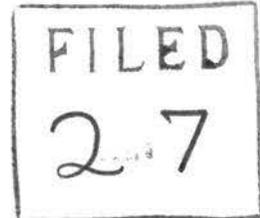


TAXATION:
FRANCHISE TAX:

Missouri corporation owning real estate in state in which it has not qualified to do business not entitled to allocate shares and surplus.

May 9, 1949



Honorable Clarence Evans
Chairman, State Tax Commission
Jefferson City, Missouri

Dear Sir:

We have received your request for an opinion of this department on the following question:

"A Missouri corporation which is not licensed to do business in any other state, owns real estate in another state. Is this real estate assessable for franchise tax in Missouri?"

Section 135 of the General and Business Corporation Act of Missouri, Laws 1943, page 410, provides for the payment of corporation franchise taxes in this state. The tax is levied upon the value of the outstanding shares and surplus of corporations organized under the laws of Missouri. The section above referred to contains the following provision:

"If such corporation employs a part of its outstanding shares in business in another state or country, then such corporation shall pay an annual franchise tax equal to one-twentieth of one per cent of its outstanding shares and surplus employed in this state, and for the purposes of this Act such corporation shall be deemed to have employed in this state that proportion of its entire outstanding shares and surplus that its property and assets in this state bears to all its property and assets wherever located." (Underscoring ours.)

That the state of Missouri may, in the situation which you have presented, constitutionally impose a tax upon the entire

outstanding capital and surplus of such corporation is believed to be clear. The rule is stated in 98 A.L.R. 1444, as follows:

"It seems to be well settled that a franchise, excise, or license tax upon domestic corporations, measured by or based on the capital stock of the corporation, is not unconstitutional or beyond the power of a state, merely because such stock represents, in whole or in part, property located outside the state."

The question, therefore, is whether or not the above-quoted statutory provision permitting allocation is applicable in the situation which you have presented. The emphasized words prescribe that a Missouri corporation, in order to be permitted to make the allocation, must employ a part of its outstanding shares "in business in another state."

Generally speaking, when a corporation is engaged in business in a state other than that of its incorporation, it is required to qualify or obtain a license or permit in such other state. Of course, the State Tax Commission is not concerned with the enforcement of the laws of other states requiring qualification of Missouri corporations doing business therein, and the fact that a Missouri corporation was or was not qualified in such foreign state would ordinarily be irrelevant in determining the corporation's liability for Missouri franchise tax.

However, the holding of real estate by a Missouri corporation outside this state presents a somewhat different situation. The rule has been quite frequently announced "that the mere ownership of property in (a) state, unaccompanied by its active use in furtherance of the business for which the corporation was formed, is insufficient in itself, or together with acts incidental to such ownership, such as the payment of taxes or the bringing of suits to protect the property against trespasses, to constitute doing business in the state." (23 Am. Jur., Foreign Corporations, Sec. 372, p. 359.) That rule was applied by the Supreme Court in this state in the case of *Parker v. Wear*, 230 S.W. 75. In that case the court said, at l.c. 80:

" * * * It is sufficient to say that the taking of a single conveyance of real

estate situated in Missouri and afterward conveying the real estate to another, standing alone, is not transacting business in the state within the prohibition of the statute. * * *

In view of this rule, we feel that the State Tax Commission, in the absence of other facts, would be justified in determining that the corporation in question, since it has not qualified in the foreign state, is not in business in such state within the meaning of Section 135, supra, and therefore is not entitled to make use of the allocation formula.

Such determination would appear to be in accord with the apparent purpose of the Legislature in enacting a provision relating to allocation, the apparent purpose being not to subject Missouri corporations engaged in business in other states to multiple franchise taxes upon their capital and surplus. The corporation here, not having qualified to do business in the state in which the real estate is located, would not be subjected to franchise tax there. Consequently, there would be no question of multiple taxation.

CONCLUSION

Therefore, it is the opinion of this department that a Missouri corporation which owns real estate in another state but has not qualified to do business in such state is subject to payment of franchise tax upon its entire issued shares and surplus, and is not entitled to allocate that portion of its shares and surplus represented by such real estate in another state.

Respectfully submitted,

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APPROVED:

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