TAXATION: All property and assets of a railroad corporation should be taken into account in calculating franchise tax.
FRANCHISE TAX:
RAILROADS:

FILED
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December 18, 1947

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Honorable Clarence Evans, Chairman
State Tax Commission
Department of Revenue
Jefferson City, Missouri

Dear Sir:

This is in reply to your letter of recent date wherein you submit a request for an opinion on the following statement of facts:

> "In order to arrive at the taxable assets of a railroad in Missouri, it has been, by agreement between the railroads and former State Tax Commissions, the policy to take the percentage of the number of main miles in Missouri against the total main miles in the system against the total assets of the railroad. The difficulty in doing this is that the railroads claim so many assets are not really assets but mere bookkeeping figures * * * * *
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> "According to our interpretation of Section 135 of Corporation Act 1943, which states as follows:
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> > 'Every foreign corporation engaged in business in this State whether under a certificate of authority issued under this Act or not, shall pay an annual franchise tax to the State of Missouri equal to one-twentieth of one percent of the par value of its outstanding shares and surplus employed in business in this state, etc., 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 <u>its property and assets in this state bears to all its property and assets wherever located</u>.'

> "We feel that the percentage should be used against all of the assets and not try to discriminate between assets."

In addition to your request, we have received from you a statement made by the Wabash Railroad Company in relation to the assessment of its franchise tax for the year 1947. From this statement and your request, it seems that the question involved is whether or not intangible property of a corporation, which does not have a situs in this state, should be taken into consideration in calculating the franchise tax. Authority for the imposition of the franchise tax is found in Section 135, Laws of Missouri, 1943, page 410. The portion of the section applicable to your question reads as follows:

> " * * * Every foreign corporation engaged in business in this state whether under a certificate of authority issued under this Act or not, shall pay an annual franchise tax to the state of Missouri equal to one-twentieth of one per cent of the par value of its outstanding shares and surplus employed in business in this state, or if the outstanding shares of such corporation or any part thereof consist of shares without par value, then, in that event, for the purposes herein contained, such shares shall be considered as having a value of $5.00 per share, unless the actual value of such shares should exceed $5.00 per share, in which case the tax shall be levied and collected on the actual value and the surplus, and for the purposes in this Act such corporation shall be deemed to have employed in this State that portion of its entire outstanding shares and surplus that its property and assets in this state bear to all its property and assets wherever located: * * * "

From a reading of this section, it will be found that the franchise tax is based on the value of its outstanding shares and surplus employed in business in this state. The controversy here is, what outstanding shares and surplus of the company are employed in business in this state? In the last clause of said Section 135, supra, a scheme for the determination of this tax is provided. It provides that a corporation shall be deemed to have employed in this state that portion of its entire outstanding shares and surplus that its property

and assets in this state bear to all its property and assets wherever located. With that principle in mind, the following formula would be used:

$$\text{Tax base} = \text{Outstanding shares and surplus} \times \frac{\text{Property and assets in Missouri}}{\text{Total property and assets}}$$

It further appears by the statement furnished by the railroad company to you that this formula has been followed by your department and the railroad company in respect to distributable property, but has not been followed altogether in respect to intangible property. However, we do find some intangible items on this statement which have, by the railroad company, been calculated under the foregoing formula.

In your letter, you state that "the two main items of contention are: 1-'Investments in Affiliated Companies' and 'Other Investments,' being the Railroads purchase of stocks and bonds in Companies affiliated or not affiliated with them. The second main item is 'Temporary Cash Investments' which consist of purchase of United States Government Bonds, the claim being that this money is invested in bonds for the purpose of paying taxes."

These items would generally come within the classification of intangibles. The fact that the company has made temporary cash investments in government bonds for the purpose of paying taxes would not remove such properties from the assets of the company until they are paid out for that purpose. In other words, the company, even though it has made investments in bonds for the purpose of paying taxes, still retains control over this investment, and we think that it would be considered as a part of the property and assets of the corporation for taxing purposes.

In the case of State vs. Freehold Inv. Co., 264 S.W. 702, 705, the Missouri Supreme Court, in speaking of the nature of this tax, said:

> " * * * It will be noted that the tax is not levied upon the capital stock and surplus, but is merely measured thereby. It is a tax imposed upon corporations for the privilege of doing business in this state. * *"

It further appears from the statement of the railroad company that the contention of that company is that the value of intangibles not used in operation are not distributable over the system because they have their situs in Ohio where

the Wabash is incorporated, and their entire value is allocated to that state. It further claims that none of the value of this class of intangibles can be assigned to Missouri because it has no situs in this state. We have made a diligent search for authorities on this question, and the most respectable authority that we find and the case most in point is the opinion of the United States Supreme Court in the case of Adams Express Company vs. Ohio State Auditor, 166 U.S. 185, 41 L. Ed. 965, l.c. 978. In that case, the question of the assessment of a franchise tax was before the court. The contention there was similar to the contention here--that is, that intangibles of the express company not located in the State of Ohio should not be taken into consideration in determining the amount of franchise tax due from the Adams company to that state. The intangibles referred to in that case consisted of bonds, stocks and investments, which produce a part of the value of the capital stock of the company. These stocks and bonds had a special situs in other states, and the express company contended that for that reason they were exempt from the provisions of the franchise tax and should not be used in calculating the franchise tax for the State of Ohio. In speaking of this contention, the court said, l.c. 978:

> "But where is the situs of this intangible property? The Adams Express Company has, according to its showing, in round numbers $4,000,000 of tangible property scattered through different states, and with that tangible property thus scattered transacts its business. By the business which it transacts, by combining into a single use all these separate pieces and articles of tangible property, by the contracts, franchises, and privileges which it has acquired and possesses, it has created a corporate property of the actual value of $16,000,000. Thus, according to its figures, this intangible property, its franchises, privileges, etc., is of the value of $12,000,000 and its tangible property of only $4,000,000. Where is the situs of this intangible property? Is it simply where its home office is, where is found the contral directing thought which controls the workings of the great machine, or in the state which gave it its corporate franchise; or is that intangible property distributed wherever its tangible property is located and its work is done? Clearly, as we think,

> the latter. Every state within which it is transacting business and where it has its property, more or less, may rightfully say that the $16,000,000 of value which it possesses springs, not merely from the original grant of corporate power by the state which incorporated it, or from the mere ownership of the tangible property, but it springs from the fact that that tangible property it has combined with contracts, franchises, and privileges into a single unit of property, and this state contributes to that aggregate value not merely the separate value of such tangible property as is within its limits, but its proportionate share of the value of the entire property. That this is true is obvious from the result that would follow if all the states other than the one which created the corporation could and should withhold from it the right to transact express business within their limits. It might continue to own all its tangible property within each of those states, but, unable to transact the express business within their limits, that $12,000,000 of value attributable to its intangible property would shrivel to a mere trifle.
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> "It may be true that the principal office of the corporation is in New York, and that for certain purposes the maxim of the common law was 'Mobilia personam sequuntur,' but that maxim was never of universal application, and seldom interfered with the right of taxation. Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18, 22 (35: 613, 616, 3 Inters. Com. Rep. 595). It would certainly seem a misapplication of the doctrine expressed in that maxim to hold that by merely transferring its principal office across the river to Jersey City the situs of $12,000,000 of intangible property, for purposes of taxation, was changed from the state of New York to that of New Jersey."
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> (Underscoring in first paragraph ours.)

Following the authority of this opinion, it would seem that the intangibles of a corporation are distributed wherever its tangible property is located and its work is done. The

taxable property of the corporation, which includes the distributable property, extends through different states, and according to the formula which the railroad company and the tax commission have agreed upon, 23.61% of the distributable property of the corporation is for tax purposes located in Missouri. Following the reasoning of the court in the Adams case, supra, then, 23.61% of all of the property, tangible and intangible, would, for tax purposes, be considered as employed in Missouri. We think the reasoning of the court in the Adams Express Company case is sound and fair and that the value of intangibles of a corporation for tax-paying purposes should be calculated on the same basis as are values of tangible property consisting of the distributable property of a corporation.

CONCLUSION

From the foregoing, it is the opinion of this department that for the purpose of determining the franchise tax on a railroad corporation, the tax commission may use the same formula for calculating the value of intangible property of a corporation employed in this state as it uses for calculating the value of tangible distributable property, and that the same per cent of intangibles of the corporation should be assigned to Missouri as having a situs therein as is assigned for tangible distributable property.

Respectfully submitted,

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APPROVED:

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