TAXATION:
CORPORATIONS: Columbia Broadcasting System, Inc., liable for franchise tax provided by Section 147.010 RSMo 1949.

June 26, 1953

Mr. Charles C. Nance, Chairman
State Tax Commission of Missouri
Jefferson Building
Jefferson City, Missouri

Dear Sir:

The following opinion is rendered in reply to your request reading as follows:

> "The Columbia Broadcasting System Inc., operating Station KMOX, with studios in the City of St. Louis, has questioned their liability for the Missouri State franchise tax on the ground that their operations are wholly interstate and therefore not subject to taxation.
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> "We are enclosing a letter and memorandum submitted to the State Tax Commission by said corporation and request an opinion from your office as to whether or not a corporation operating, as its only activity in this State, a broadcasting station, in the manner stated, is required to pay a Missouri franchise tax."

Records in the office of the Secretary of State for Missouri disclose that Columbia Broadcasting System, Inc., a foreign corporation organized under the laws of the State of New York, made application in April, 1952, for a certificate of authority to transact its corporate business in Missouri as a foreign business corporation, and such certificate was duly issued. Documents supporting such application for

authority disclose the purpose or purposes for which said corporation was organized and which it proposes to pursue in the transaction of business in Missouri as "radio broadcasting and activities related thereto, and perhaps at a later date television broadcasting and activities related thereto"; that an estimate of the total value of all the property of the corporation for the following year (1953) that will be located in Missouri is $200,000.00; that the estimated gross amount of business of the corporation to be transacted by it at or from places of business in the State of Missouri during such year (1953) is $1,000,000.00; and that the proportion of stated capital and surplus represented by the corporation's property and business in Missouri for the following year (1953) is $216,112.00.

The Missouri franchise tax which Columbia Broadcasting System, Inc., seeks to evade is provided for in the following language found in Section 147.010, RSMo 1949.

> " * * * * * *
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> "2. Every foreign corporation engaged in business in this state whether under a certificate of authority issued under chapter 351, RSMo 1949 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 five dollars per share, unless the actual value of such shares should exceed five dollars 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 chapter 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.
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> " * * * * * *."

In your opinion request this office is directed to a letter and memorandum submitted to the Tax Commission by attorneys for Columbia Broadcasting System, Inc., and an opinion is sought to determine whether or not, in view of the facts stated in said memorandum, the corporation is liable for the franchise tax. It is contended, on behalf of the corporation, that all of its operations in the State of Missouri partake of an interstate character so as to exempt it under the Federal Constitution from such a State tax.

In the case of State v. Phillips Pipe Line Company, 97 S.W. (2d) 109, 339 Mo. 459, the Supreme Court of Missouri, en banc, in 1936, was construing Section 4641 R. S. Mo. 1929, which remains virtually unchanged in Section 147.010, RSMo 1949, quoted above. The Court spoke as follows at 339 Mo. 459, l.c. 466:

> " * * * It is true that in the Ozark Pipe Line case it is stated that the Corporation Franchise Tax Law of Missouri levies a tax 'upon the privilege or right to do business,' citing State ex rel. v. State Tax Commission, 282 Mo. 213, 221 S.W. 721, and that such a tax may not be imposed upon a corporation transacting only interstate business here, but we have construed the Corporation Franchise Tax Law as one imposing a tax upon the privilege or right to do business as a corporation (State v. Pierce Pet. Corp., 318 Mo. 1020, l.c. 1027, 28 S.W. (2d) 790; Mo. Athletic Assn. v. Inv. Corp., 323 Mo. 765, l.c. 773, 20 S.W. (2d) 51), and it has been frequently held that such a tax is not one which inevitably results in burdening interstate commerce although the business of the corporation taxed may be interstate. * * *"

In State v. Shell Pipe Line Corporation, 345 Mo. 1222, 139 S.W. (2d) 510, the Supreme Court of Missouri, Division No. 2, had before it for construction, in 1940, Section 4641 R. S. Mo. 1929, referred to above. The Court reviewed the Phillips Pipe Line Company case, alluded to above, and spoke as follows at 139 S.W. (2d) l.c. 519:

> "In the Phillips Pipe Line Company case the validity of the franchise tax was upheld, but because the court considered the activities there shown to be the transaction of intrastate business and not necessarily incident to and therefore not a part of interstate transportation. * * *
>
> "It seems to be conceded, as we think it must be, that the state cannot lay a tax on purely interstate commerce or upon the privilege of engaging therein. * * *"

No decision of the Supreme Court of Missouri has been found which deals with the application of Missouri's corporation franchise tax law as applied to corporations engaged in radio broadcasting. For the present status of the law on this question we feel that the following summary found in 11 A.L.R. 2d, l.c. 989, is not to be overlooked:

> "It appears that the present status of the law on the subject under consideration is that a tax measured by the gross receipts of a radio broadcasting business, without regard to whether such business is interstate or intrastate commerce, will be considered as imposing an unconstitutional burden on interstate commerce, in view of the decision of the United States Supreme Court, in Fisher's Blend Station v. State Tax Com. (1936) 297 US 650, 80 L ed 956, 56 S Ct 608, set out supra.
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> "And a similar view would be taken as to an occupational tax on persons engaged in the business of radio broadcasting if such tax makes no distinction as to interstate and intrastate business. See Whitehurst v. Grimes (1929, DC Ky) 21 F2d 787, and Atlanta v. Southern Broadcasting Co. (1937) 184 Ga 9, 190 SE 594, set out supra.
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> "However, a local tax on the gross receipts of a radio broadcasting business, based solely on the intrastate activities of such a business may be regarded as not imposing an unconstitutional burden and may be regarded as valid if the amount of the intrastate busi-

> ness is capable of ascertainment. See Albuquerque Broadcasting Co. v. Bureau of Revenue (1947) 51 NM 332, 184 P2d 416, 11 ALR2d 966, and WDOD Broadcasting Corp. v. Stokes (1941) 180 Tenn 677, 177 SW2d 837, set out supra.
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> "The difficulty of separating interstate and intrastate activities of a radio broadcasting station for the purposes of taxation may be avoided by a statute imposing a flat tax on the occupation of radio broadcasting with an exemption as to interstate broadcasts. See Beard v. Vinsonhaler (1949) _____ Ark _____, 221 SW2d 3, app dismd 338 US 863, 94 L ed __, 70 S Ct 146, reh den 338 US 896, 94 L ed ____, 70 S Ct 239, set out supra."

A note appended to the above quoted summary discloses that in the Albuquerque Broadcasting Company case the New Mexico Supreme Court remanded the case to the trial court with directions to determine the amount of taxes paid on intrastate commerce, and the district court on remand directed refund of all amounts collected from the broadcasting company because of the impossibility of an apportionment of the tax between interstate and intrastate business. It stands admitted that the New Mexico tax was directed to gross receipts.

In the case of Memphis Natural Gas Company v. Stone, 335 U.S. 80, 92 L. Ed. 1832, 68 S. Ct. 1475, decided June 21, 1948, the Supreme Court of the United States was reviewing the State franchise tax of Mississippi as applied to a foreign corporation and measured by the value of capital used, invested or employed in Mississippi. The foreign corporation involved was a pipe line company, a part of whose pipe line passed through Mississippi but which did no intrastate business in such state and had never qualified therefor under the laws of Mississippi. The Mississippi franchise tax statute imposed a "franchise or excise tax" upon all corporations "doing business" within the state equal to $1.50 for each $1,000.00 or fraction thereof, of the value of capital used, invested or employed within the state. Aside from the fact that the Mississippi statute defined the term "doing business", the tax statute is not dissimilar to that found at Section 147.010, RSMo 1949. In sustaining the tax the Supreme Court of the United States spoke as follows at 92 L. ed., l.c. 1844:

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> "The Mississippi excise has no more effect upon the commerce than any of the instances just recited. The events giving rise to this tax were no more essential to the interstate commerce than those just mentioned or ad valorem taxes. We think that the state is within its constitutional rights in exacting compensation under this statute for the protection it affords the activities within its borders. Of course, the interstate commerce could not be conducted without these local activities. But that fact is not conclusive. These are events apart from the flow of commerce. This is a tax on activities for which the state, not the United States, gives protection and the state is entitled to compensation when its tax cannot be said to be an unreasonable burden or a toll on the interstate business."

In the light of the ruling in Memphis Natural Gas Company v. Stone, supra, and the facts made evident by records in the office of the Secretary of State for Missouri, alluded to in the forepart of this opinion, it is the opinion of this office that when Columbia Broadcasting System, Inc., has filed the franchise tax report required by Section 147.020, RSMo 1949, the State Tax Commission of Missouri may, and should, determine and assess the tax due as directed in Section 147.030, RSMo 1949.

CONCLUSION

It is the opinion of this office that Columbia Broadcasting System, Inc., a foreign corporation licensed to do business in Missouri, is liable for payment of Missouri's corporation franchise tax provided for in Section 147.010, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Julian L. O'Malley.

Yours very truly,

JOHN M. DALTON
Attorney General

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