

CORPORATIONSE : Upon submitted facts, the entire assets of a
FRANCHISE TAX: : domestic corporation named, are subject to
TAXATION: : Missouri franchise tax.
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February 17, 1955

Honorable James M. Robertson
Chairman
Missouri State Tax Commission
Jefferson City, Missouri

Dear Mr. Robertson:

Your letter of November 15, 1954, requesting an official opinion reads, in part:

"Is a promissory note owned by a domestic corporation drawn and executed by a foreign corporation, at its out-state office, and deposited with collateral securing it at an out-state depository, such an asset as should be considered for the purpose of determining corporation franchise tax liabilities as being employed in this state?

"Conversely then what is the franchise tax status of capital invested and evidenced by notes held in Missouri by a foreign corporation doing business in Missouri, and executed by a domestic corporation?

"We are transmitting herewith a letter received by this department setting forth the factual conditions and arguments out of which this request for your opinion arises."

The enclosed letter to which you refer reads, in part:

"* * * BBC Corporation was formed several years ago for the purpose of organizing, acquiring, operating and otherwise dealing in and with professional baseball clubs.

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Its present assets, as shown in its 1954 Corporation Franchise Tax Report, consist of the following:

Cash and other assets situate within the State of Missouri \$ 584,147.40

A promissory note situate outside the State, i.e., on deposit in Illinois bank, in principal amount of \$1,200,000., with accrued interest of \$9,468.49 \$ 1,209,468.49

"The aforesaid note was drawn and executed by Baltimore Orioles, Inc., a Maryland corporation, at its offices in the latter state. This is indicated on the face of the Note, itself. The instrument also expressly states that it is payable at 231 South LaSalle Street, Chicago, Illinois.

"Immediately upon delivery to BBC, the note was deposited, together with collateral securing it, in the Trust Department of the City National Bank and Trust Company of Chicago, Illinois. It has remained there to this date.

"BBC has recently received a franchise tax notice assessing a tax of \$896.81. The amount of this assessment, of course, was based upon the inclusion of the note and accrued interest.

"We respectfully submit that the inclusion of this 'out-of-state' asset was in error. * * *."

Section 147.010, RSMo 1949, makes the following provision:

"1. For the taxable year of 1943 and thereafter every corporation of this state organized under or subject to chapter 351, RSMo 1949 or under any other laws of this state shall, in addition to all other fees and taxes now required or paid, 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, or if the outstanding shares of such corporation or any part thereof consist of shares without par value, then, in that event,

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for the purpose 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. 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 chapter 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.

"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.

"3. Provided, that this law shall not apply to corporations not organized for profit, nor to express companies, which now pay an annual tax on their gross receipts in this

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state, and insurance companies, which pay an annual tax on their premium receipts in this state; provided, bank deposits shall be considered as funds of the individual depositor, left for safekeeping and shall not be considered in computing the amount of tax collectible under the provisions of this chapter."

The first question to be determined is whether an enforceable promise to pay a domestic corporation, said promise to pay being evidenced by a promissory note, and secured by certain collateral, constitutes "surplus" within the meaning of Section 147.010. In State ex rel. Marquette Hotel Inv. Co. vs. State Tax Commission, 282 Mo. 213, 221 S.W. 721, 723, it is said:

"* * * the Legislature must have intended the word 'surplus' to mean the difference between the amount of the outstanding capital stock of a wholly domestic corporation, such as relator is, and the amount of the assets of that corporation, excluding liabilities of all sorts. * * *."

From the above, we must conclude that an enforceable promise to pay should be considered as "surplus."

The promise to pay, as evidenced by the note, is thus taxable unless "such corporation employs a part of its outstanding shares in business in another state." In that event, the franchise tax may be levied only on that part of the outstanding shares and surplus employed in this state.

In the case of Union Electric Co. vs. Morris, 359 Mo. 564, 222 S.W. (2d) 767, it was held by the Supreme Court of Missouri that shares of stock owned by a Missouri corporation in two Illinois corporations not doing business in Missouri, were not subject to the Missouri franchise tax. The shares were located in Missouri, but the Court indicated that, although the shares were technically the property owned by Union Electric Co., said shares merely represented the money of Union Electric Co. actually employed in two Illinois businesses.

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We deem the above case not to be controlling in the present situation. Here, the domestic corporation has not invested its money in a foreign business. It has merely loaned money to a foreign corporation. Apparently the obligation to pay the loan is absolute, and is not contingent upon the success of the business enterprise, and is not solely payable from the income of the business. Even if the business should fail, the lender can look to assets of the foreign corporation, and the collateral, for the satisfaction of the debt. We conclude that the mere lending of money to a foreign corporation does not constitute "employ(ment) (of) a part of its outstanding shares in business in another state" within the meaning of Section 147.010. That being so, all of the outstanding shares and surplus of the domestic corporation are subject to the franchise tax.

Your second question is too general to be susceptible to a definite answer. The proper determination of what property is subject to the franchise tax is often extremely difficult, since it requires a close analysis of the use made of the corporate property. We suggest that when a concrete situation baffles the Commission, that you may submit to us a detailed factual statement of the operations of the particular corporation. We shall then be happy to render such assistance as we are able.

CONCLUSION

In the premises therefore, it is the opinion of this office that, upon the submitted facts, the entire assets of the domestic corporation, as listed above, are subject to the Missouri franchise tax.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Very truly yours,

JOHN M. DALTON
Attorney General

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