TAXAT AND REVENUE: Foreign corporation not engaged in business in Missouri is not liable to Missouri franchise tax.

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

Dear Sir:

Reference is made to your request for an official opinion of this office, reading as follows:

"Re: Corporation Franchise Tax - Texas Eastern Transmission Corporation

"On March 1 we received the 1948 Corporation Franchise Tax Report from the above corporation. On Line 12 of said report calling for property and assets in Missouri, they quote $8,201,672.76. The assessment was made on this figure and the tax of $4100.84 was certified to the Director of Revenue who in turn forwarded a statement for that amount to the corporation.

"This week the attorney for the corporation called on us stating that they felt they were not liable for corporation franchise tax because they did no business in Missouri. It appears that this corporation is operating under a certificate of authority from the Secretary of State which was granted in October 1947. They have approximately 140 miles of line in Missouri, entering the state on the South and leaving the state on the East. They have one pumping station at Oran, Missouri. This is strictly a gas corporation and they neither buy or sell gas within the State of Missouri. The only office maintained is a registered office in St. Louis, Missouri, as required by the Secretary of the State, how-

> ever, this office is merely a place for them to receive mail.
>
> "We will appreciate your advising us whether or not this corporation is subject to a corporation franchise tax for 1948."

Although not so stated directly in your opinion request, we infer that the corporation referred to therein is one whose domicile is in a foreign state, which inference is confirmed by further advice from you.

The Missouri franchise tax is imposed under the provisions of Section 4997.135, Mo. R. S. A. The pertinent provisions of this statute read 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: * * * "

In construing this section as previously found, in which the same terminology was employed by the General Assembly, the Supreme Court of Missouri has held that the tax levied thereunder is one upon the privilege of transacting business in this state as a corporation. We quote from State v. Pierce Petroleum Corporation, 2 S. W. (2d) 790, l. c. 794:

> "The tax is not a property tax, but an excise levied upon the privilege of transacting business in this state as a corporation. State v. Tax Commission, 282 Mo. 213, 221 S. W. 721. * * *"

This construction has been reaffirmed in subsequent cases, notably Missouri Athletic Ass'n v. Delk Investment Corp., 20 S. W. (2d) 51, and other cases.

This construction has been further narrowed in State v. Shell Pipe Line Corp., 139 S. W. (2d) 510, l. c. 521, to mean only engaging in business of an intrastate nature directly incident to the primary purposes of the corporation.

We consider the foregoing to be pertinent in view of the statement incorporated in your opinion request to the effect that the corporation "did no business in Missouri."

The question of whether or not a foreign corporation is "engaged in business" within the State of Missouri, within the meaning of the franchise taxing statutes, is, in each case, one of fact. The decisions of the various state and federal courts are not in accord as to the indicia that must be looked to in determining whether certain acts constitute the "doing of business." This variation may be explained by reason of the problem having been approached not only from the angle of taxation, but also with respect to jurisdiction over such foreign corporations, the method of obtaining service thereon, liability for criminal acts of officers and agents, etc. However, the rule seems to be well settled in Missouri that "engaged in business" means the carrying out of corporate functions necessarily incident or directly connected with the primary charter purposes. Such being the case, and if it be determined, as a matter of fact, that the corporation now under consideration does not "engage in business" within this state, we believe that no liability for Missouri franchise tax exists.

We do wish to point out that cases holding, under similar circumstances, that liability does exist are not apposite, inasmuch as some taxing statutes impose liability solely upon the basis of a foreign corporation having the right to engage in business within the state into which it enters, without regard to whether or not such corporate functions are in fact actually exercised. Therefore, such cases do not serve to impose liability upon the corporation now under consideration.

CONCLUSION

In the premises, we are of the opinion that a foreign corporation, not actually engaged in business in Missouri, is not liable for the Missouri franchise tax, even though a large proportion of the assets of such foreign corporation are physically situate within this state.

Respectfully submitted,

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APPROVED:

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Attorney General

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