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June 13, 1947.

Archibald M. Knowles, General Attorney
Maine Central Railroad
Portland 4, Maine

Re: Railroad Franchise Tax

Dear Mr. Knowles,

I received your letter of June 6th relating to the conference in my office on June 5th, at which time, as you state in your letter, we discussed certain features of the statute relating to the annual railroad excise tax and you left with me a copy of the opinion of Edward W. Wheeler, Esq., dated December 15, 1942, and a copy of the opinion rendered under date of July 16, 1926 by Hon. Raymond Fellows at the time that he was Attorney General.

After studying the statutes involved in this matter I am of the opinion that the opinion of Mr. Fellows in 1926, in which he says, "I wish to advise that the general rule is 'as between the State and taxpayer, the latter is liable for the tax on such taxable property as he owned on the date fixed by law for the completion of the assessment. Consequently in the absence of statute, no liability for taxes attaches during the current year until after the next regular date for assessment,'" is outmoded.

I want to call your attention to the fact that the statute has been changed since Mr. Fellows, as Attorney General, wrote that opinion in 1926. An examination of the steam railroad tax act shows that it provides how "gross average receipts per mile are to be determined. Section 3 of Chapter 91 of the Public Laws of 1881 gave the formula as follows: "The amount of gross transportation receipts as returned to the railroad commissioners for the year ending on the thirtieth of September next preceding the levying of such tax shall be divided by the number of miles of railroad operated to ascertain gross receipts per mile." Except for changes in the date and change from railroad commissioners to Public Utilities Commission, these provisions are found in R.S. 1883, Chapter 6, Section 42; R. S. 1903, Chapter 8, Section 25; R.S. 1916, Chapter 9, Section 27.

In 1927 the legislature, under the provisions of Chapter 27, P. L. 1927, changed the method of computing the tax on steam railroads to what is known as the "gross-net method." This in turn became Section 30 of Chapter 12, R.S. 1930, and will now be found in Section 111 of Chapter 14, R.S. 1944.

This provision for the ascertainment of the steam railroad excise tax is not based on the "average gross receipts per mile," but on a relationship of net and gross receipts; and in the amendment of 1927 the formula for ascertaining the average gross receipts per mile was dropped. That is the method fixed by statute to ascertain the amount of tax on railroads.

However, referring to Section 110 of Chapter 14, R.S.1944, as amended by Chapter 42, Section 6, P.L. 1945, reads as follows:

"Every corporation, person, or association operating any railroad in the state under lease or otherwise shall pay to the state tax assessor, for the use of the state, an annual excise tax for the privilege of exercising its franchises and the franchises of its leased roads in the state (underlining mine), which, with the tax provided for in section 4 of chapter 81, is in place of all taxes upon such railroad, its property, and stock."

So it seems clear to my mind that the State excise tax is not a tax upon the gross transportation receipts. It is a tax for the privilege of exercising its franchises and the franchises of its leased roads in the State, and the statute fixing the amount of the tax and how ascertained is the method set up by the legislature, and of course the tax is not assessed on the property owned by the railroad on the date fixed by law for the completion of the assessment, as stated in the opinion of former Attorney General Fellows in 1926.

It is my opinion that it was the intent of the legislature that the tax should be assessed for the calender year, based on the amount of the gross transportation receipts as returned to the Public Utilities Commission for the year ending on the 31st of December preceding the levying of such tax. I agree with Mr. Wheeler in his opinion to your treasurer, when he states as follows: "The distinction between an excise tax levied upon gross transportation receipts and a tax measured by such receipts has no practical significance. It is the receipt of such revenues whixh creates the tax liability and determines its amount. The collection of such revenues and the liability to pay an excise tax in respect thereof, accrue simultaneously."

To further show the intent of the legislature in enacting the taxation of railroad companies statute, I call your specific attention to Section 114 of Chapter 14, R.S. 1944, which provides as follows: "Any corporation, person, or association aggrieved by the axtion of the state tax assessor in determining the tax on railroad companies, through error or mistake in calculating the same, may apply for abatement of any such excessive tax within the year for which such tax is assessed. . . "which indicates clearly that the abatement is based on the calculations of the state tax assessor on the returns filed by the railroad company on the amount of the transportation receipts."

"The deciding factor is the written will of the Legislature. The intend of such government department, embodied in the form necessary so to constitute it, is the law. To that intention, which is to be obtained primarily from the language used, effect, if it does not run counter to some constitutional inhibition, shall be given." Opinion of the Justices, 136 Maine, 529.

With this in mind, it seems to me that, inasmuch as the tax is not a property tax, but a franchise tax on the rights of the road to do business, the proper method of accrual is to take the tax out of the earnings of the year that the franchise was exercised by the railroad, regardless of the statutory time when the tax should be paid.

Sincerely yours,

Ralph W. Farris
Attorney General

RWF:c