

MAINE STATE LEGISLATURE

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STATE OF MAINE

Inter-Departmental Memorandum Date June 10, 1977

Thomas S. Squiers, Director

Dept. State Tax Division

From Jerome S. Matus, Asst. Atty. Gen.

Dept. Bureau of Taxation

Subject Opinion on Application of Insurance Company Penalties

FACTS:

You have requested a formal opinion on the application of insurance company penalties. A foreign mail order insurance company, not being a mutual fire company doing mill business, with no agents or place of business in the State of Maine and which did not solicit or have any other business activity in the State of Maine during the year 1976 but which was licensed in 1977 and still is licensed to do business in the State of Maine, filed on February 25, 1977, an "Annual Premium Tax Return" showing no gross direct premiums written in Maine during the calendar year 1976.

On March 22, 1977, there was assessed against the foreign mail order insurance company a penalty in the amount of \$125.00 pursuant to 36 M.R.S.A. § 2521-A.

QUESTION:

Was there statutory authority under 36 M.R.S.A. § 2521-A for the assessment of the penalty?

ANSWER:

No, the provisions of 36 M.R.S.A. § 2521-A do not provide for the assessment of a penalty upon a foreign mail order insurance company with no agents or place of business or any business activity in the State of Maine even though the company is licensed to do business in the State of Maine.

REASONS:

The statutory provision to be interpreted reads in pertinent part:

"Every insurance company, association or attorney-in-fact of a reciprocal insurer subject to tax as imposed by this chapter shall on or before the last day of each April, July and October file with the State Tax Assessor a return for the quarter ending the last day of the preceding month. These

returns may be on an estimated basis, provided that each installment equals at least 25% of the total tax paid for the preceding calendar year or 25% of the total tax to be paid for the current calendar year. An authorized company official shall affirm which elective is selected. Such elective cannot be changed during the current calendar year. The final return shall be filed on or before March 15th covering the prior calendar year.

At the time of filing such returns each insurance company, association or attorney-in-fact of a reciprocal insurer shall pay to the State Tax Assessor the amount of tax shown due and the State Tax Assessor shall pay over all receipts daily to the Treasurer of State. Any insurance company, association or attorney-in-fact of a reciprocal insurer who neglects to make returns or pay the amount of tax shown due shall be liable to a penalty of \$5 a day for each day in arrears or 1/2 of 1% of tax liability, whichever is greater, together with interest at the rate of 1% per month or fraction thereof due on demand by the State Tax Assessor, and recoverable in a civil action. The State Tax Assessor may waive penalty for cause.

. . . .

Insurance companies, associations or attorneys-in-fact of a reciprocal insurer with annual tax liability not exceeding \$500 may with approval of the State Tax Assessor file an annual return with payment on the last day of January each year covering the prior calendar year."
(emphasis supplied) 36 M.R.S.A. § 2521-A.

The threshold question is whether the foreign mail order insurance company was subject to the tax as imposed by Chapter 357 of Title 36. (§ 2511 through § 2522) If the foreign mail order insurance company was subject to the chapter and there being a tax liability of zero, the penalty was properly computed at \$5 a day for each day in arrears from January 31, 1976, the due date of the tax.

In order to determine whether the filing requirements of 36 M.R.S.A. § 2521-A apply, one must look to the provisions of 36 M.R.S.A. §§ 2511, 2513 and 2517 as these are the provisions which determine who is subject to tax. Section 2511 applies only to life insurance companies or associations organized under the laws of the State of Maine and § 2517 applies only to foreign mutual fire insurance companies which insure only factories or mills or property connected with such mills. Both these sections are clearly inapplicable as we are dealing with a foreign mail order insurance company which was not a mutual fire company doing mill business.

The other section, 36 M.R.S.A. § 2513 makes subject to the tax "Every insurance company or association which does business or collect premiums or assessments including annuity considerations in the State [Maine] except those mentioned in § 2511 and § 2517, including surety companies and companies engaged in the business of credit insurance or title insurance. . . ." The given facts disclose that no premiums were collected during the calendar year 1976, this leaves the determination whether the foreign mail order insurance company did business in the State of Maine in 1976. There is no question but that the company was licensed to do business, however, a distinction must be drawn between the authority to do business and the actual doing of business.

It has been stated as black letter law that

"Constitutional and statutory provisions regulating foreign insurance companies apply only when they are doing business within the state, and the question is largely one of fact to be determined by the circumstance of each particular case."
44 C.J.S. Insurance § 81, 576.

There are no given facts which would lead the office to conclude the subject foreign insurance company was doing business in the State of Maine during the calendar year 1976.

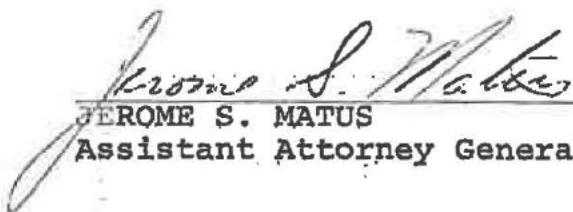
The Maine Insurance Code provides that

"In addition to other aspects of insurance operation to which provisions of this Title by their terms apply, 'transact' with respect to a business of insurance includes any of the following, whether by mail or any other means:

1. Solicitation of inducement;
2. Negotiations;
3. Effectuation of a contract of insurance;
4. Transaction of matters subsequent to effectuation and arising out of such a contract." 24-A M.R.S.A. § 9.

This opinion is limited to the facts of this case.

If the given facts had established that the foreign insurance company had engaged in any of the types of activity referred to in 24-A M.R.S.A. § 9, the conclusion may have been different. In the absence of any such activity, this office must conclude that the foreign mail order insurance company was not doing business in the State of Maine in 1976, and hence was not subject to provisions of the insurance premium tax chapter of the Maine Statutes (Chapter 357 of Title 35). Thus no penalty could be assessed under the provisions of 36 M.R.S.A. § 2521-A.


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